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# THE ADVOCATE-WITNESS RULE:
# ANACHRONISM
# OR
# NECESSARY RESTRAINT?

A Thesis
Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other governmental agency.

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37TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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# THE ADVOCATE-WITNESS RULE:
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ABSTRACT: This thesis examines the rule that prohibits a lawyer from being both the trial advocate and a witness in the same case. This rule brings into conflict ethical concerns, evidentiary considerations, client rights, and other systemic judicial matters. This thesis concludes that the rule should be abolished. The judicial system can glean benefits provided by the rule through other avenues that avoid negative aspects of the current approach.

# THE ADVOCATE-WITNESS RULE: ANACHRONISM OR NECESSARY RESTRAINT?

## I. INTRODUCTION

The advocate-witness rule of professional conduct prohibits counsel from testifying in the same cases in which they serve as advocates. Recent codifications of this rule allow attorneys to fill both roles in extremely limited circumstances.[1] This thesis will examine this rule and its underlying rationales, consider its role in the United States judicial system, and explore possible alternatives and their usefulness.

A review of the relatively brief history of the advocate-witness prohibition is the starting point for an examination of the advocate-witness rule. The rule is over 150 years old,[2] but most of the cases and commentary discussing it originate within the past 30 years.[3] Therefore, the focus of this analysis is on the past three decades.

The advocate-witness rule's history in the United States centers on three general codifications of that rule: the Canons of Professional Ethics;[4] the Model Code of Professional Responsibility;[5] and the Model Rules of Professional Conduct.[6] Each has its problems.

Courts and commentators have identified strengths and weaknesses of each attempt to reduce the advocate-witness rule to a written ethical code. These decisions and analyses are useful not only to address specific advocate-witness rule issues; but also they raise serious questions as to any current need for the

advocate-witness prohibition in the American judicial system.[7]

Scholars, judges, and lawyers have advanced a number of rationales to support the need for the advocate-witness rule.[8] Each rationale has champions and challengers.[9] Some of the problems with the advocate-witness rule originate from the attempts to codify it. Other drawbacks began with the rule's first application and transcend all attempts to reduce the rule to a written code. Among the problems inherent in any advocate-witness rule is a conflict with the right to counsel.[10] The rule negatively affects the attorney-client relationship.[11] It is often a tactical weapon allowing the opposing party to burden the client of the advocate-witness with expense, delay, and inconvenience.[12] It lends itself to no objective test under which courts and attorneys can consistently assess and anticipate the rule's application.[13] It places courts in the position of enforcing an ethical rule that has no evidentiary counterpart.[14]

A critical analysis of the benefits and costs associated with the advocate-witness rule shows that the American judicial system does not <u>need</u> the advocate-witness rule as currently applied.

## II. HISTORY OF THE RULE

### A. BEFORE CODIFICATION OF THE RULE

#### 1. <u>Origins of the Rule</u>

The rule prohibiting a lawyer from acting as both trial advocate and witness for his client in the same

case first appeared in an 1846 English case, Stones v. Byron.[15] Before Stones the weight of such testimony was in question,[16] but court's assessed its admissibility under the same standards as applied to any other witness's testimony, such as incompetency and interest. The American Bar Association considers the rule one of "long standing."[17] Other commentators find the rule to be relatively new.[18]

In Stones the judge, acknowledging the lack of precedent, created the rule based on his fear that a lawyer acting as both advocate and witness would confuse the jury.[19] Only six years later a court sitting en banc overruled Stones,[20] but that judge had sewn the seed of the advocate-witness rule in the English system.[21]

## 2. Competency

Prior to Stones, and even for a period of time after that case, incompetency[22] sometimes precluded attorneys from acting as advocate and witness in the same case.[23] The incompetency originated in the lawyer's involvement in the case. There is no longer any doubt that lawyers are competent to testify for their clients.[24] "A lawyer, no less than a vagrant, teenager or litigant, is a competent witness."[25]

Closely related to the incompetency issue and equally inapplicable today is disqualification by interest. Narrower than incompetency, disqualification by interest arose from the advocate-witness's partisanship for his client.[26] Since courts no longer reject testimony of witnesses with pecuniary interests in the outcome of the case, disqualification by

interest has "no present significance."[27] Only the advocate-witness rule survives as a basis to exclude a witness's testimony for the sole reason that he is a trial counsel in the case.

## B. CANONS OF PROFESSIONAL ETHICS

The American Bar Association Canons of Professional Ethics originated in 1908[28] and remained the ethical standard for the legal profession until the advent of the Model Code of Professional Responsibility.[29] Canon 19 articulated the first codification of the advocate-witness rule in the United States:

> When a lawyer is a witness for his client, except as to merely formal matters, such as attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client.[30]

Although the language of Canon 19 seems clear, it was not entirely free of ambiguity. This uncertainty bears some review because it was a harbinger of problems drafters would face as they tried to refine the rule.

Canon 19 contains an important internal ambiguity. "Leav[ing] the trial" of the case to others would seem to indicate that the counsel could remain involved with all nontrial aspects of the case. On the other hand, "Testifying . . . on behalf of the client" would seem to require the attorney to withdraw completely from representing the client in any capacity.[31]

Another point of confusion in Canon 19 is the meaning of "merely formal matters."[32] The canon uses the phrase "attestation or custody of an instrument and the like." "And the like" is unclear, but the custody of any type of evidence may be an appropriate subject of a challenge, depending on the circumstances in which it is offered. For example, the chain of custody might be an important part of the item's evidentiary value.[33]

Another significant Canon 19 issue is the distinction between testifying "for" and "against" the client. Canon 19 addresses counsel testifying "for" his client.[34] "Canon 6, the general provision on conflicts of interest, . . . required lawyers to serve their clients with 'undivided loyalty'" and so addressed testifying against the client.[35]

Despite its ambiguity, courts rarely addressed issues involving application of Canon 19. It "was a rule of professional propriety, not evidence law."[36] As of 1970, when the Model Code of Professional Responsibility replaced the Canons of Professional Ethics,[37] the majority of courts allowed the defense attorney to call himself as a witness for his client without withdrawing.[38] The primary basis for this lack of strict rule application was to avoid penalizing the client, either to preserve the reputation of the legal profession or to discipline his attorney.[39] Courts applied the rule more strictly to prosecutors.[40] As of 1970, in almost no civil case had federal courts disallowed an attorney's testimony on behalf of his client, nor was there any movement in the federal courts to require the attorney to withdraw as trial attorney prior to giving his testimony.[41] Thus, relevant attorney testimony entered into evidence, and

the client's choice of representation remained largely intact.

Canon 19 came over fifty years after an English court first raised the possible impropriety of a lawyer being both advocate and witness. It caused some confusion, but had little impact on trials or clients.

## C. MODEL CODE OF PROFESSIONAL RESPONSIBILITY

In 1970 the Model Code of Professional Responsibility replaced the Canons of Professional Ethics.[42] This code was to be both "an inspirational guide to [lawyers] and . . . a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards."[43] Unlike Canon 19, which apparently focused on the trial itself, the Model Code applies the advocate-witness proscription as soon as the attorney first knows, or it becomes obvious, that either he or a member of his firm ought to be called as a witness.[44] The Model Code is significant because it is the basis for similar rules in many states and federal districts.[45] Although the Model Code served as the American Bar Association ethical standard for only twenty years, its impact on the advocate-witness rule is profound.

### 1. The Model Code Provisions

The two provisions of the Model Code of Professional Responsibility that codify the advocate-witness rule are Disciplinary Rule (DR) 5-101(B) and DR 5-102. DR 5-101(B) provides:

> A lawyer shall not accept any employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.[46]

DR 5-102 provides:

> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).
>
> (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.[47]

## 2. Issues in Model Code Format

The unusual organization of the Model Code into the three separate standards of canons, disciplinary rules, and ethical considerations, made uniform implementation difficult. The disciplinary rules are important because they are the basis for disciplinary action against an attorney.[48] While the Ethical Considerations (EC) are to be a source of inspiration,[49] they can be a source of confusion. Some restate DR's, some explain DR's, some recommend conduct beyond DR requirements, and some "go where no DR exists."[50]

The advocate-witness rule EC's and DR's are reversed. The disciplinary rules, as a minimum level of conduct, should be easier to comply with than the ethical considerations.[51] The advocate-witness rule ethical considerations allow for a subjective assessment of the hardship to the client and the materiality of the attorney's testimony. This subjective evaluation would allow more leeway for an advocate to justify testifying than would DR 5-101 and DR 5-102, which impose an objective standard of "ought to be called."[52] In the advocate-witness rule situation, a lawyer might meet the standards in the ethical considerations for remaining on the case, yet face censure for failing to comply with the applicable disciplinary rules.[53] The Model Code's internal inconsistencies hinder its usefulness as a codification of the advocate-witness rule.

### 3. Model Code Definitional Problems

As with the Canons of Professional Ethics, the Model Code advocate-witness rule met with confusion. In the case of the advocate-witness rule, such confusion may be more than an important part of the history of that rule. It could indicate a lack of clear bases for that rule. A detailed discussion of the Model Code's advocate-witness rule provisions serves as both a history and as documentation of the lack of strong rationales for the rule's existence. A review of the problems with the Model Code's version of the advocate-witness rule also leads to a better understanding of what the drafters of the applicable Model Rules of Professional Conduct attempt to achieve in their version of the rule.

#### a. The Meaning of "Ought to Be Called"

One source of confusion is the meaning of the phrase "ought to be called," which appears in both DR 5-101(B) and DR 5-102(A).[54] Most courts interpret this term restrictively to mean that the lawyer is the only person available to testify about a crucial fact.[55] Some courts interpret these words far more broadly to include a lawyer who is only a potential witness.[56]

Courts that narrowly interpret "ought to be called" feel an attorney should not be called as a witness for his client when another source could deliver the evidence to the trier-of-fact.[57] The attorney who is also a witness may possess crucial information that he must divulge during the trial if the court is to reach a just result.[58] If no

substitute evidence exists, the attorney must withdraw and testify under this view of the rule.

The other words nearby the phrase "ought to be called" in the DR's do not clarify that phrase. When courts interpret this phrase narrowly, the word "knows," which precedes it in the Model Code, is superfluous. It may actually encourage "improper indecisiveness."[59] A subjective, "knowing" approach makes enforcement difficult[60] and adds little to the rule.[61]

A broad interpretation of the phrase "ought to be called" is much more troublesome for the potential attorney-witness who wishes to remain as trial counsel. Applying the advocate-witness rule to those who are only potential witnesses increases the exposure of the advocate to a disqualifying motion or an ethical violation.[62] For example, this broad interpretation of "ought to be called" led to disqualification of an attorney merely because he attended negotiations relevant to the litigation, even though the principals in the case were also present and able to testify.[63] One court went further. "[The attorney] ought to testify even if his testimony only corroborates the deposition testimony of [his client]."[64] Such a broad interpretation encourages abuse of the advocate-witness rule, for example, as a tactical measure "to disrupt an opposing party's preparation for litigation."[65]

This uncertainty associated with the phrase "ought to be called" may yield strange results. It "implies that in some instances [the lawyer] would be disqualified when [he] ought to testify, even if it were clear that [he] would not testify, and, conversely, that [a lawyer] would not be disqualified

when [he] would in fact testify even though he ought not."[66]

The final issue raised by the phrase "ought to be called" is how a judge determines who falls within its purview. One court said "that the lawyer and his client decide that the lawyer need not testify is not controlling. Instead, the court must independently assess the situation."[67] In courts that interpret "ought to be called" broadly, judges substitute their assessment of the value of the attorney's testimony for the judgment of the lawyer and the client. Professor Sutton would leave the decision to the trial counsel and his client, who could "avoid the ethical question entirely" by not calling the attorney as a witness.[68]

The court is not in the same position as the advocate. The judge does not know as much about the case as the lawyer knows. He does not have privileged communication with the client. Court selection of witnesses is difficult. Advocate testimony might appear helpful and relevant to the client's case, but it might hurt the case in other ways of which the judge cannot be aware.[69]

"Ought to be called" and "knows" fail to clearly define when the advocate-witness rule applies. The subjective standard is too easy for an imaginative attorney to circumvent. The objective standard is difficult to make clear and places the court in an awkward position of determining what witnesses the client should or should not call. Finally, who "ought" or "ought not" to testify may not align precisely with whom the client and his attorney actually call. Such a decision is fundamentally one of trial tactics best reserved to the lawyer and his client.

b. The Meaning of "Prejudicial to His Client"

DR 5-102(B) allows a lawyer who has already accepted employment to continue representation "until it is apparent that his testimony is or may be prejudicial to his client."[70] Discovery of lawyer testimony that harms the client demands that the potential advocate-witness immediately withdraw. The code provision is clear on its face. This code section is particularly important in light of the increased adverse effect an attorney's testimony contrary to his client's interests may have upon the trier-of-fact.[71]

The words "prejudicial to his client" are not as straightforward as they appear. Professor Wydick defines prejudicial as "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony."[72] This definition leaves room for the adverse advocate-witness to remain on the case while testifying contrary to his client's interests. An attorney could attempt to avoid withdrawal by claiming that the substance of his testimony would not warrant his independent cross-examination had it come from an independent witness.

Professor Wydick's interpretation does avoid some of the danger of withdrawal forced by the opposing counsel merely including the advocate on his witness list.[73] But defining the term "prejudicial to his client" as tantamount to a conflict of interest removes the need for the term at all. Such testimony would fall under conflict of interest prohibitions, which include a client waiver provision.[74] The phrase

"prejudicial to his client" adds nothing to the conflict of interest analysis and forecloses the client's option of consenting to this conflict of interest.

c. Meaning of "Nature and Value of Legal Services"

DR 5-101(B)(3) provides an exception to the general advocate-witness prohibition when the attorney's testimony relates "solely to the nature and value of legal services rendered in the case." [75] One application of this exception is to assist the court in determining the amount of attorney's fees, when they form part of the judgment in a case.[76] Though this purpose is part of the rule, the prospect of the lawyer testifying for his own financial gain runs contrary to several of the strongest reasons supporting the advocate-witness rule's existence. It is extremely prejudicial to the opposing party.[77] If ever an advocate-witness is exposed to allegations of bias, testifying for his fee is such a time.[78] The public's perception of the legal profession could certainly suffer when lawyers testify in court to justify the large fees incurred by their clients.[79] All of the rationales contending that the advocate-witness rule supports a just judicial system would apply in the fee testimony situation, if they apply at all.[80] Yet the only reason for this exception is to avoid wasting the court's time and the opponent's money to require the client to retain a new attorney to litigate the fee of the first firm.[81]

An economy of time and money basis for this DR 5-101 exception is completely at odds with the majority

of courts that interpret saving resources of the advocate-witness's client as no reason for the "substantial hardship" exception to the advocate-witness rule.[82] This absence of internal consistency among the Model Code exceptions for the rule explains some of the changes instituted by the Model Rules.

Not every court agrees that "nature and value of legal services" means only the question of a fair fee. An example of a court uniquely interpreting this exception to the advocate-witness rule to reach a just and logical result occurred in United States v. Baca.[83] In Baca the defense counsel wanted to testify as to his client's competency to stand trial. The court said "[the client's] lack of memory of the incident in his discussions with [his defense counsel], his lack of retention of [his defense counsel's] legal advice and instructions for more than a short time, and [his defense counsel's] resulting difficulty in representing his client adequately all directly relate to 'the nature and value of legal services'"[84] That the Baca court used this novel approach to circumvent application of the advocate-witness rule suggests some inherent problems with the rule.

d. Meaning of "Matter of Formality" and "Uncontested"

The Model Code provides three additional exceptions to the advocate-witness rule, including one for "uncontested matters,"[85] one for "matters of formality,"[86] and one for "substantial hardship on the client."[87] Though the American Bar Association anticipated that the exceptions for formal and uncontested matters "will usually be easily

identifiable and not present a difficult problem,"[88] such harmony did not emerge.

Courts had split over the meaning of "merely formal matters" when they applied Canon 19.[89] Courts have not defined what is a purely formal matter under the Model Code.[90] One commentator contends that receipt of a letter is "definitely formal."[91] A court reached the opposite result regarding the contents of the lawyer's briefcase, because such testimony was subject to attack for credibility.[92]

The relevance of credibility cannot be the determinative factor if the formality and uncontested issue exceptions have any value. Every witness is subject to credibility attack for everything he says.[93] Even if the testimony is true to the best of his knowledge, a myriad of other factors, such as bias, inexperience, and physical handicap may erode his credibility. "[I]f an attack for credibility suffices to remove the testimony from the purview of the exception, the exception is meaningless."[94]

This credibility approach to defining "matters of formality" or "uncontested" closely parallels the attempt to define matters falling within these exceptions as "uncontroverted."[95] Uncontroverted means an "absence of directly contradictory evidence"[96] that is "well supported by the surrounding circumstances."[97] The problem with such a definition of "uncontroverted" is that a mere objection would seem sufficient to withdraw a matter from the exceptions to the advocate-witness rule.[98] As with the "credibility" analysis, applying the "uncontroverted" approach would swallow the exception.

Another approach to applying the "matters of formality" and "uncontested" exceptions is to examine the importance of the testimony to the client's case. If it is not vital to his case, then the testimony may fall within these exceptions.[99] Like "credibility" and "uncontroverted," "materiality" should not be decisive. "[R]are indeed is the need for immaterial evidence . . . ."[100]

One final proposal to circumvent these exceptions is to use "modern procedural devices such as stipulations, admissions, and pre-trial conferences" to obviate the need for testimonial proof.[101] The author of this approach argues that the "ultimate determination lies with the trial judge."[102] Such judicial discretion implies that the trial judge has the power to order parties to enter into testimonial substitutes. Judges do not have such broad power, although they can exert enormous pressure on a party who is refusing to accept a reasonable alternative to the advocate-witness's live testimony. Such an order would "apply" the mere formality and uncontested exceptions by eliminating the need for testimony on the matter. Unless judges acquire this authority, their rulings cannot replace the role of these exceptions to the advocate-witness rule.

### e. Meaning of "Withdraw"

Another issue in the Model Code version of the advocate-witness rule is the meaning of "withdraw." DR 5-102(A) states that "he shall withdraw from the conduct of the trial,"[103] and EC 5-10 says that he may elect to "refuse employment or to withdraw."[104] As with

Canon 19 and the word "trial," "withdraw" in these code sections is undefined. It could mean a withdraw from the actual trial or from the representation completely. It could mean withdraw immediately or before the time to testify actually arises. Courts ordering withdrawal rarely address these issues.[105]

When these scope and timing issues of withdrawal do arise, courts and commentators do not agree on the appropriate resolution. Some feel the withdrawal should be complete, a clean break between attorney and client.[106]

The Court of Military Appeals came to the opposite conclusion in United States v. Baca. The trial judge in Baca disqualified the lead defense counsel and barred him from the courtroom. The judge did explicitly allow that defense attorney to assist the replacement counsel in her trial preparation.[107] The Baca court would have preferred to have allowed the defense counsel to affirmatively continue on the case, to include sitting at counsel table during trial.[108]

The Court of Appeals for the Second Circuit disagrees with the Court of Military Appeals on the importance of the actual trial versus preparation of the case. In United States v. Cunningham the court stated that the right of a defendant to be represented by the counsel he retained is a "right of constitutional dimension."[109] In spite of this strong language, the court concluded that it is more significant to deprive a client of an attorney in the preparation phase of his case than for the actual trial.[110]

The definition of withdrawal is important because it can affect the cost and quality of the first trial

counsel's replacement.[111] The longer the original counsel can remain on the case and the greater his continued capacity, the more likely replacement counsel will be unnecessary due to a pretrial resolution. If trial occurs, then the greater role of the first counsel will simplify and reduce the expense of locating a new attorney in many cases.[112] All phases of trial practice are important. It is a mistake to rationalize an application of the advocate-witness rule by stating that pretrial activity is what really matters. The Court of Military Appeals's approach is the best of the divergent applications of the Model Code's withdrawal provisions.

Distinct from withdrawal itself is the timing of the withdrawal. The way the Model Code sets forth the advocate-witness rule, timing is irrelevant when the testimony is for the client. The trial counsel must withdraw unless the nature of the testimony somehow falls within one of the four exceptions.[113] Only when the testimony is prejudicial to the client is the time of the discovery of the need for, and nature of, the testimony relevant.[114] The Model Code is clear, though complicated, on the timing issue.

Existing judicial and evidentiary remedies could yield a just result, tailored to the specific facts of the case at hand, without an application of the advocate-witness rule to direct withdrawal. A judge has a responsibility to raise any matter necessary to promote justice during a trial.[115] If a trial attorney hurt his client by remaining on the case, and if such harm rendered that counsel's performance ineffective, the trial judge could order the counsel to take appropriate steps to correct the deficiency.[116] For

example, the judge could order the trial counsel to use an assistant counsel for the direct examination when the lead counsel testifies.[117] If the harm were to the opposing party, the judge could grant relief based on Rule of Evidence 403, that the prejudicial impact of the attorney's testimony substantially and unfairly outweighs any probative effect it might have.[118] Withdrawal is a powerful measure. The judge's supervisory power and the evidentiary rules render it largely unnecessary.

### f. Meaning of "Trial"

As with Canon 19, what constitutes the "trial" is also uncertain. DR 5-102(A) speaks in terms of withdrawing "from the conduct of the trial" and "representation in the trial."[119] As of 1979 no case had defined "trial" or what constituted trial testimony.[120] One court said the pretrial hearing in a criminal case was not a trial.[121] Another court found that the Model Code advocate-witness rule applied to a grand jury proceeding.[122] Motions for summary judgment apparently are pretrial.[123] Unless the testimony of the advocate-witness is clearly part of the merits of the case, whether such testimony falls under the Model Code's version of the advocate-witness rule is uncertain.

Combined with the cloudy withdrawal picture, this lack of a clear definition of "trial" for the purposes of the advocate-witness rule is another strong example of confusion due to unclear code provisions. Perhaps this lack of clarity flows from the lack of definitive purposes for the advocate-witness rule itself.[124]

g. Meaning of "Substantial Hardship"

Of all of the Model Code terms that generate confusion, inefficiency, and seemingly less-than-perfect results, the phrase "substantial hardship" in DR 5-101(B)(4) heads the list. "Although the [American] Bar Association has attempted to define this standard more clearly, the attempts have not been very successful."[125]

The majority of courts apply this exception so narrowly as to render it devoid of any real benefit to its intended beneficiary, the client.[126] A second group of courts grant the client some benefit of the substantial hardship exception up to the point of trial.[127] If the issue still exists at that time, then these courts, too, turn inflexible.[128]

The tragedy of these harsh, narrow interpretations of the substantial hardship exception to the rule is that they strip the client of the one Model Code provision accruing directly to his benefit.[129] When courts apply this exception narrowly, the client loses his one chance to escape a costly and possibly unnecessary application of the rule.

An example of the almost abusive fashion in which the majority of courts deprive clients of their attorneys through not granting this exception best illustrates its scope. In an Oregon case, that the disqualified defense attorney's reputation was "one of the best local trial lawyers in defending driving-under-the-influence cases" was not enough to trigger substantial hardship.[130] If it were, then "an outstanding trial lawyer in any given universe of trial practice would be free to testify in his client's

case."[131] In this same case, the client, who was "traumatized by her arrest," faced six months before for her trial would end, apparently because she had to obtain a new attorney and court date. Adding this hardship to the attorney's qualifications also did not reach the level to trigger the exception.[132] Such a decision is not unusual. "[F]ew courts give the adverse consequences more than passing notice, typically observing that the availability of other lawyers precludes genuine hardship."[133]

Apparently, the only reported case giving deciding weight to the important bond of the attorney-client relationship is United States v. Baca, from the Court of Military Appeals.[134] That court said, "Defense counsel are not fungible. Although the accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with the counsel in the absence of demonstrated good cause."[135] The Court of Military Appeals endorses a more accommodating approach to the substantial hardship exception. It places the burden on the opposing party to demonstrate the harm that would befall his cause or the system before it would foreclose that exception to the defendant who desired to retain his testifying counsel.[136]

As with the importance of the attorney to the client, "the expense and delay routinely incident to disqualification"[137] do not satisfy the substantial hardship exception in the majority of courts. If they did meet the threshold requirements for the exception, then "that exception would soon swallow the rule."[138] Perhaps this strict approach to financial hardship finds its genesis in the Supreme Court's observation in

Cobbledick v. United States that "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."[139]

Arguably the ultimate example of this rigid, narrow interpretation of the substantial hardship exception occurred in United States ex rel. Sheldon Electric Co. v. Blackhawk Heating and Plumbing Co.[140] In that case, the plaintiff's counsel had a ten-year relationship with the client. His firm had devoted 450 hours in preparing the case. The defendant had delayed its motion to disqualify the plaintiff's counsel until the day of trial.[141] The court pronounced the record "devoid of any indication of [counsel's] particular value to the plaintiff."[142] It disqualified the attorney and his firm, saying that "the court cannot act contrary to [the public] interest by permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility."[143]

The client may not obtain quality replacement counsel because the outstanding bills owed his initial attorney would consume much of any contingent fee the second firm could hope to obtain.[144] That the majority of courts refuse to consider expense and delay as factors in the substantial hardship equation decreases the usefulness of this exception.

### g. Meaning of "Distinctive Value"

The substantial hardship exception itself contains another term that suffers from imprecision. The term is "distinctive value," as used in DR 5-101(B)(4):

disqualification "would work a substantial hardship on the client because of the distinctive value of the lawyer."[145]

One interpretation of "distinctive value" is that the lawyer must have had it before accepting the client's case.[146] "As a consequence, the client is not protected against losing the investment he has made in his counsel, except in the rare circumstance in which the firm was uniquely qualified to represent the client before it was hired."[147]

Such an interpretation of distinctive value is inconsistent with American Bar Association Formal Opinion 339, which lists three examples potentially satisfying this exception to the rule: a long and complex suit in which the lawyer's testimony is unanticipated; an extended attorney-client relationship giving the lawyer unusual familiarity with the client's affairs; and a lawyer testifying about juror misconduct.[148] These three circumstances clearly contemplate distinctive value arising after the litigation commences. Such an interpretation of "distinctive value" is the only meaningful one.

Perhaps this problem in interpreting the distinctive value wording of the substantial hardship exception, and therefore the exception itself, originates in the possible inconsistency between the wording of DR 5-101(B)(4), the "substantial hardship" exception, and its underlying EC 5-10 provision. EC 5-10 states that factors to be considered in determining when "it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw" include the client's "personal financial sacrifice," the "materiality of [the lawyer's] testimony," and "the

effectiveness of [the lawyer's] representation in view of his personal involvement."[149] "This language, unlike that of DR 5-101(B), seems to encompass more than strictly the hardship arising from the distinct value of the lawyer or firm as counsel in the particular case."[150]

"If the substantial hardship exception were liberally applied by the courts, it would remove much of the sting from the trial counsel/witness rule."[151] This liberal interpretation of "substantial hardship" and "distinctive value" is important because an opponent is most likely to seek disqualification when it would most hurt the advocate-witness's case.[152] A broader substantial hardship exception "could work to alleviate the use of [disqualification] as a tactical weapon."[153] The Court of Military Appeals, applying the exception absent "demonstrated good cause" why it should not do so[154] in Baca, implements a liberal interpretation of the substantial hardship exception.

Applying a broader substantial hardship exception places the burden on the moving party to show replacement counsel is available, in order to show that the harm it suffers due to the testimony outweighs the cost and inconvenience to the client of losing his chosen counsel. Such a burden on the moving party would improve the client's chances of proceeding with that counsel. The broader exception's true benefit would depend on how difficult the courts made the burden of showing good cause for disqualification.

The current rigid majority view of the substantial hardship exception, and the meaning of "distinctive value" within that exception, "plays right into the hands of a litigant who wants to delay and harass.

Through a motion to disqualify, such a litigant can put off an impending trial and often saddle the opponent with enormous added expense."[155] Correcting such improper tactical uses of the advocate-witness rule was a concern of the drafters of the Model Rules of Professional Conduct.[156]

## D. MODEL RULES OF PROFESSIONAL CONDUCT

### 1. The Relevant Model Rules Provisions

In August 1983 the American Bar Association House of Delegates adopted the Model Rules of Professional Conduct.[157] One of the rules that underwent some change was the advocate-witness rule. In the Model Rules, the codification of the advocate-witness rule is distributed over four rules: Rule 3.7; Rule 1.7; Rule 1.9; and Rule 1.10.[158] Rule 3.7 codifies the actual advocate-witness rule, incorporating the others by reference.

Rule 3.7 provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.[159]

The Model Code Comparison expressly addresses only one issue, the merger of the old Model Code's

"formality" and "uncontested" exceptions into the Rule 3.7(a)(1) "uncontested" exception.[160] This absence of express drafter comment has left courts and commentators to interpret this new codification of the advocate-witness rule.

The drafters of Rule 3.7 relied on only three of the rationales for the advocate-witness rule.[161] Advocate-witness testimony unfairly harms the opposing party, and it can create a conflict between the lawyer and his client.[162] The third rationale seems to be a concern for the judicial system, centering on a possible confusion of the roles of advocate and witness.[163]

The Model Rules codification of the advocate-witness rule seeks to "minimize the use of the trial counsel/witness rule as a tactical weapon by an adversary who wants to harass or delay."[164] Rule 3.7 relies on Rule 1.7 to handle the situation in which an attorney's possible testimony will somehow conflict with an interest of his client.[165] "Where the conflict is such as to clearly call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment."[166] This language amounts to a warning to courts "to be wary of the motives of an adversary who seeks to become a client's protector -- just as one might suspect a wolf who seeks to guard the chicken coop."[167]

Another significant aspect of Rule 1.7 is that it provides for client consent to the conflict, after consultation.[168] Even when a possible conflict exists, Rule 3.7, by incorporating Rule 1.7, has apparently

provided a client consent mechanism to defuse an opponent's objection based on that opponent's alleged desire to protect the advocate-witness's client from such conflict.[169]

The "substantial hardship" exception still uses the term "substantial hardship," but no longer do the words "distinctive value" appear in the rule or the comment.[170] The rule instead demands a balancing of the client's and the opposing party's interests.[171] The comment to Rule 3.7 identifies the balancing factors as "the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses."[172] "Even if there is a risk of such prejudice . . . due regard must be given to the effect of disqualification on the lawyer's client."[173] One final factor is the foreseeability to either or both sides of an the advocate-witness problem.[174]

The structure of these "substantial hardship" balancing factors requires the party moving for disqualification to first show the lawyer is a necessary witness, then to show the lawyer's testimony will prejudice them, and finally to show that the harm they will incur outweighs the harm to the client of losing his lawyer. Before the Rule 3.7 balancing test applies, the attorney who wishes to testify must ensure that his representation is also consistent with the conflict provisions of Rules 1.7, 1.9, and 1.10.[175]

If the opposing party loses his motion at any step along this path to disqualification, he can still attempt to suppress the testimony on evidentiary bases, such as, hearsay or Rule of Evidence 403.[176] Under Rule of Evidence 403, the opposing counsel would argue that

the prejudicial impact of the advocate testifying substantially and unfairly outweighs any probative value such testimony might have in the case. To support his motion, the opposing counsel would rely upon the same reasons that failed to persuade the court in his motion to disqualify. Those traditional bases for the advocate-witness rule not referenced by the drafters of Rule 3.7 could also sway the court to suppress the testimony, particularly a court that is not fond of attorneys testifying.[177]

Another Model Rule ameliorating the impact of the advocate-witness rule upon the client is Rule 1.10.[178] Under this rule, another lawyer from the original advocate's firm can conduct the trial even if the advocate-witness rule does disqualify the original counsel,[179] unless there is a conflict of interest.[180] As a result, changing attorneys should be less costly to the client.

The Model Rules of Professional Responsibility represent a considerable step back from what turned out to be the high water mark of the advocate-witness rule and the low ebb of attorney and client freedom. A step back is a step in the right direction for the legal profession. As one commentator aptly notes, "the Model Rules offer us a scalpel where the Code offers us a garden spade."[181]

2. Meaning of "Likely to Be a Necessary Witness"

The unanimous opinion of courts and commentators is that the Rule 3.7 language setting a threshold of "likely to be a necessary witness" before courts engage in the balancing test places a higher burden on the

opposing party seeking disqualification than did the Model Code standard.[182] The interpretation of "necessary" is not unanimous. The American Bar Association states it means "no other witness could testify, and obviates disqualification if the lawyer's testimony is merely cumulative."[183] Professor Wydick, in a hypothetical designed to illustrate the meaning of "necessary"[184] assumes other witnesses saw what the lawyer saw, and that all witnesses "have equal powers of perception, memory, and narration, and equal qualities of credibility."[185] If Professor Wydick is correct in requiring such an assumption to make his point, then the "necessary" requirement may offer little protection to the advocate. All witnesses are unique. They will not all be equally perceptive or credible. A lawyer will likely be one of the best witnesses. He is well- educated, trained to discern important facts, and arguably articulate.

The Notes to the 1981 Proposed Final Draft included additional insight into changes of the old Model Code approach in reducing the tactical use of the advocate-witness rule through the use of this idea of "necessary" witness. The Rule 3.7(a) language "likely to be a necessary witness" means that no other witness could testify.[186] "The authors of the Model Rules thus seek to bury the notion that the trial counsel/witness rule should apply whenever a trial counsel might conceivably be a witness."[187]

One final note on the meaning of "necessary" is that the word does not appear in Rule 3.7(b), but only in Rule 3.7(a). Reconciling the wording of these two paragraphs in light of the fact that they are in the same rule is a common method of construing a rule.

Disqualifying a firm because one of its members is "likely to be called as a witness" would be different, and presumably easier, than disqualifying the trial advocate himself, who must be "likely to be a necessary witness."[188] Such a construction is illogical. It should be easier to disqualify the trial counsel when he must testify than when a member of his firm will take the stand.

### 3. Applying Old Thinking to the New Rule

Many courts and some commentators burden Rule 3.7 with some of the rigid thinking of the Model Code's codification of the rule. This approach strips the Model Rules codification of many, even all, of the changes implemented in the Model Rules.

One way in which courts anchor the Model Rules codification with the old Model Code version is to rely on the fact that, "on the printed page, Rule 3.7 strongly resembles its predecessors in the Code."[189] The Court of Military Appeals, recently a leader in client's rights under the advocate-witness rule, may be guilty of such a reading of Model Rule 3.7 and DR's 5-101 and 5-102. In a 1988 case the court acknowledged that the American Bar Association had adopted the Model Rules in August 1983, but applied the Model Code as the rule in the case, calling the Model Code "authoritative guidance on ethical matters."[190]

The court also said "The ABA Model Rules of Professional Conduct and their Comment . . . are fully consistent with this discussion and analysis of the earlier model code."[191] The results the court reached may have been "fully consistent,"[192] but the two rules

and their respective approaches to the advocate-witness situation are very different. Similarly, another federal court found "the standard of the Model Code sufficiently analogous to the standard described in Rule 3.7"[193] to apply DR 5-102 cases in interpreting Rule 3.7.

Some federal courts are unable to relinquish the paternalistic role toward the client they developed under the Model Code.[194] As a result, they fail to fully implement the changes in the advocate-witness rule in Model Rule 3.7:

> Whether or not Rule 3.7's change was intended to afford deference to the client's judgment, this court finds that the client's judgment is not properly the controlling factor. Although the client's wishes may be considered, the client will almost always be reluctant to forego the assistance of familiar counsel or to incur the expense and inconvenience of retaining another lawyer.[195]

Finally, courts have retreated to the Model Code version of the rule by asserting that some of the rationales allegedly supporting the Model Code also support the Model Rule despite the clear absence of such factors from Model Rule 3.7 or its comment. Courts talk in terms of preventing advocates from arguing their own credibility,[196] enhancing public perception of the legal profession,[197] and protecting opposing counsel from difficulty of impeaching a fellow attorney,[198] even though none of these factors appear in Rule 3.7 or its Comment.

For nearly 150 years the advocate-witness rule grew increasingly costly for the client. Model Rule 3.7 as drafted reverses this trend. Whether courts will apply it as drafted remains to be seen.

## III. REASONS FOR THE RULE

The history of the rule does not inspire great confidence in it. It began with one judge, whose decision was soon overruled.[199] It took over half a century before the first codification, which was confusing[200] and largely ignored.[201] The Model Code provisions resolved little, if any, of this uncertainty, and contributed many interpretation problems of their own.[202] The Model Rules as drafted may correct many of these codification-related issues, but merely because a rule is or can be codified does not make it necessary.

The advocate-witness rule can work a substantial hardship on clients. Thus the reasons postulated by courts and commentators for the rule must support these consequences. Weak, confusing rationales indicate that problems with the rule are not only in the codification, but with the rule itself.

The following sections analyze the various rationales supporting the existence of the advocate-witness rule. After stating the case for each rationale, this analysis discusses any weaknesses in that purported underpinning for the rule.

### A. PROTECT THE CLIENT

#### 1. Advocate-Witness Is Easily Impeached

The American Bar Association says one of the main ethical objections to a lawyer's testifying for his client is that the advocate is "an obviously interested witness."[203] "It takes no vivid imagination to foresee

that if the suspicion of the jury is aroused about the basic credibility of the lawyer as a witness, the client's whole cause, regardless of its merits, might well fall with the discredited lawyer-witness."[204] This perceived weakness in attorney testimony typifies the danger to the client the rule allegedly prevents.[205]

Some courts feel these roles are so inconsistent that they have actually reduced the value of the advocate-witness's testimony even when he is the only witness on an issue. In one case, the court found that the trial court was justified in ignoring the attorney's uncontradicted testimony. "[I]n the absence of withdrawal from the case, the interest of the attorney destroyed the credibility of his testimony."[206]

An extension of the theory that the attorney-witness is impeachable and therefore harmful to his client is that, with his witness credibility harmed, the lawyer's performance as an advocate may also suffer. This reduction in the attorney's effectiveness in both roles must inflict additional harm on his client.[207] This impeachability theory concludes that withdrawal as trial advocate and severance of the debilitating ties to the client would renew the value of the advocate-witness's testimony.[208]

The impeachability rationale for the advocate-witness rule faces considerable criticism. Withdrawal may not eliminate impeachment vulnerability.[209] Refusal of employment and withdrawal eliminate impeachability only if the attorney had no ties to the client other than declining the offer of employment. The attorney may have other matters in which he represents this litigant.[210] If he withdrew, he may still have a contingent fee pending. He might also expect future

business if his testimony benefits the litigant.[211] The interests of the testifying attorney are substantially the same as other witnesses with a financial bias. There is no rational basis for treating the advocate-witness differently from other witnesses based on his impeachability.[212] "Withdrawal . . . is more likely to injure the client's representation than strengthen his witness."[213]

Another criticism of this rationale is that the harm to the client of his attorney testifying is uncertain. There are other benefits a testifying advocate may offer his client, such as an unfair advantage in argument.[214] There is an uneasy balance of improper benefit and harm to the client.[215] Such an attack on the impeachment rationale is without merit. The judicial system is sophisticated enough that it need not rely on one uncertain wrong neutralizing another to handle the attorney-witness situation.[216]

Not all courts agree that the attorney who is the sole witness is an incredible witness. When the Court of Military Appeals addressed this situation in United States v. Baca it said, "[A]ny possibility [the attorney was] . . . impeachable for interest and . . . a less effective witness is of no moment: He was the only witness."[217] The Court of Military Appeals probably did not mean that the attorney was unimpeachable. He had evidence the court needed, and he could testify willingly, violating no rule of evidence. Pursuing a per se rule of no credibility would deprive the court of whatever evidentiary value remained of the advocate's testimony after opposing counsel cross-examined him.[218] The court's approach in Baca is more consistent with examining all the evidence

and thus is the better rule for handling the advocate's impeachability.

2. Advocate-Witness and Necessary Objectivity

The advocate-witness rule prevents another alleged danger to the client. An advocate who testifies may not perform his representation duties as effectively because he is emotionally involved as a partisan witness.[219] The advocate-witness rule eliminates personal involvement and increases attorney objectivity and effectiveness. The trial judge in Baca relied in part on this basis to relieve the defense counsel of his representation duties after he had testified for his client. The judge said that the defense counsel "in this case is too emotionally involved to be an effective advocate, and accordingly the public policy in support of the [advocate-witness] rule is met in fact in this case."[220]

Counsel who are involved as witnesses lose so much of their objectivity that they also sacrifice judgment to their client's detriment.[221] Those applying this rationale consider whether a "neutral advocate" would rather have the attorney as witness or as advocate.[222]

Relying on an objective "neutral advocate" test is shallow. Almost every neutral advocate, given a choice, will pick a professional as a witness.

The Court of Military Appeals does not endorse this excessive emotional involvement rationale.[223] Excessive involvement with a client may be ineffective in some circumstances, but it should not result in disqualification under the advocate-witness rule.[224]

Again, the Court of Military Appeals approach is a good one. Attorneys often accept cases because they believe in the cause. Excessive emotional involvement potentially impairing representation should not be a reason to disqualify counsel. It is part of an ineffective assistance claim by the client.

### 3. Costs of the Rule

The advocate-witness rule purports to serve the client, but there is little concern with the cost to the client of applying the rule to his case. The only party who stands to lose when courts enforce the rule is the client.[225] Refusing testimony without the advocate first withdrawing, refusing advocate participation as trial counsel after testifying, and chastising the advocate-witness in the presence of the jury are all sanctions that punish the client. The "client is twice injured, once by the attorney and once by the court."[226] Dean Wigmore said, "Why punish the innocent client? Why not suspend the counsel from practice? Courts are sometimes queerly illogical."[227] To prevent an attorney from being both advocate and witness because he may be biased or perceived to be biased by the trier-of-fact is costly to the client and harmful to his cause.[228]

Any application of the advocate-witness rule harms the client.[229] The costs are exacerbated when a court enforces the rule in a rigid fashion, instead of applying a balancing approach to the facts of the case before it.[230] The American Bar Association endorsed such a rigid approach in Formal Opinion 339, issued in 1975: "Any doubt about the answer to the ethical

question . . . should be resolved in favor of the lawyer's testifying and against his becoming or continuing as counsel."[231]

One rationale for this rigid approach is to protect the client from himself. Paternalism is justified because the client will be reluctant to forego familiar counsel and to incur the additional expense and inconvenience of finding a new lawyer. Since the attorney who wants to stay on the case will be advising the client on the issue, client consent may be tainted by bad advice.[232]

Once again, an ineffective assistance of counsel action is a better means of handling the attorney who gives erroneous advice.[233] Justice is better served by determining in each case whether a mechanical, rigid application of the rule might not cause more harm than good to the client and the judicial system.[234]

Yet another cost of the advocate-witness rule to the client is that it effectively penalizes the forethought to hire an attorney in advance of litigation.[235] "To some people unaccustomed to dealing with lawyers, hiring a lawyer is traumatic; and being forced to repeat the process may mean more than recurring trauma, it may cause the client to forsake his claim."[236]

A tangible cost of the advocate-witness rule to the client is literally a cost in terms of dollars. Employing the advocate-witness rule may force the client to incur considerable expense to employ another counsel. This second lawyer is usually less suitable to the client, or else the client would have retained him initially.[237] The disqualified attorney is still entitled to a reasonable fee for services already

performed.[238] As a result, in contingent fee situations, "it may be difficult, or at least costly, to find subsequent counsel."[239]

Class actions are another area in which the advocate-witness rule is expensive. Federal law allows parties, to include lawyers, to plead their own cases.[240] A federal district court allowed the advocate-witness-party to represent herself only after forcing her to withdraw from representing the other members of the class.[241]

This handling of class action representation is inefficient. The result of applying the rule is that the class must hire different lawyers. The attorney-witness-litigant must go through a charade of withdrawing and converting to pro se representation, but he remains active at the trial. Costs to the plaintiff class increase with the addition of another advocate, and the costs of a losing defendant possibly increase if he must pay the winning class's attorney fees. The court and parties must also suffer delays while the additional attorneys prepare their cases.

Ironically, the bases for the advocate-witness rule apply "more strongly to the lawyer representing himself, since he is more impeachable for interest, and therefore potentially more embarrassing to the profession."[242] Yet, the lawyer-litigant is beyond the reach of that rule. "[I]t is implicit that a lay party may not only try his own case but also testify on his own behalf. We do not think because he is a lawyer he should be deprived of that right."[243] If the rights of the lawyer to represent and testify for himself can overcome the situation in which the advocate-witness

rule would seem most applicable, then the judicial system would seem able to survive without it.

### 4. Testifying Against the Client

The last area supporting the advocate-witness rule under the rationale that it protects the client arises in the case where the attorney will be called by the opposing party to testify against his client's interests. Presumably, such testimony would not concern a privileged matter, or the attorney could block such a move by the opposing counsel.[244] Generally,

> no disciplinary rule requires the withdrawal of a lawyer who, at trial, is called as a witness by an opposing party if the lawyer had no previous knowledge or reasonable basis for believing that he ought to be called by that party. . . . [If the] testimony will be adverse to the client . . . we are not prepared to hold that it would never be ethically permissible, but we note that with such employment the lawyer also accepts a heavy responsibility.[245]

The principal basis for this rationale for the rule is that the damage adverse advocate-witness testimony may do to the client's case is incalculable. No client should bear this enormous risk. "[N]o skilled advocate can accurately predict the extent to which the trier of fact may be influenced by a piece of damaging evidence extracted from the client's own trial counsel."[246] This situation presents the greatest threat to the client of all the situations in which the advocate-witness rule exists to protect him.

One interesting approach to solving this problem without the advocate-witness rule would be for the

prospective advocate-witness to rely on Rule of Evidence 403[247] to argue that his testimony's probative value is substantially outweighed by the prejudicial effect on his client. Such an argument would be enhanced by other evidence tending to make his testimony cumulative.[248]

Should this evidentiary argument meet with no success, client consent should prevail. He should be allowed to assume the risk associated with his counsel's adverse testimony. An ineffective assistance of counsel remedy exists if the attorney's decision to remain on the case, or his advice leading to his client's consent to his dual role, is incompetent.

When the basis for the advocate-witness rule is client protection, the advocate-witness rule unnecessarily separates trial advocates from other witnesses. "[L]awyers as a class are not so immoral as to lie under oath, and their testimony on behalf of their clients should not be discredited automatically. Instead, the testimony of the advocate should be accorded the same treatment as that of any other interested witness."[249] Courts should not rigidly apply the advocate-witness rule to sever the attorney-client relationship, either as trial counsel or in any other representational capacity, without considering the harm done to the client in light of the supposed benefit to him. Client consent is appropriate when the reason for the applying the advocate-witness rule is to protect the client.

## B. PROTECT THE OPPOSING PARTY

A second benefit flowing from the advocate-witness rule is the protection of the party opposing the advocate-witness. Such protection is designed to preserve equal footing for both sides in the litigation.

### 1. Cross-examining Opposing Counsel

A reason often cited for the advocate-witness rule is to relieve opposing counsel of the awkwardness associated with cross-examining a fellow attorney.[250] Allowing an attorney to testify could allow him to abuse professional courtesy to blunt the opposition's cross-examination.

In one case, the fear was not a timid cross-examination, but one that was too fierce.[251] Preventing advocate testimony in this case prevents opposing counsel from losing his objectivity and thus from being less than effective in representing his client.

This rationale for the rule receives a chilly reception from those commentators who have considered it. One basis for rejecting this rationale is the ethical duty of the opposing counsel to cross-examine any witness as best suits the interests of his client.[252] Such a duty will overcome any conflict with a desire to be excessively courteous to the opposing advocate-witness. Furthermore, once disqualified as trial counsel the witness remains a fellow attorney.[253] The advocate-witness rule cannot eliminate misguided courtesy to fellow lawyers.

The excessive ferocity concern has no merit. As long as the cross-examination comports with the rules of evidence, the heavy-handed prophylactic measure of disqualifying the testifying counsel as trial counsel for his client is unjustified. The trial judge can use his supervisory authority to keep cross-examination within appropriate bounds.[254]

2. Testifying Enhancing Argument

Fear that the advocate testifying will unfairly enhance the credibility of his argument is another commonly advanced basis for protecting the opposing party with the advocate-witness rule.[255] The advocate-witness rule prevents a perception that the testifying lawyer "is enhancing his own credibility as advocate by virtue of having taken an oath as a witness."[256]

Another basis for the rule flows from this enhanced argument theory. The advocate-witness rule protects the opposing party from improper argument by the attorney-witness. The advocate-witness may become confused during argument and interject personal opinion suited only to the witness stand into his argument.[257]

Closely related to the enhanced argument theory is an enhanced testimony theory. An attorney is an officer of the court. A jury may "place undue weight" on his testimony.[258] The advocate-witness could gain an undue advantage by "vouching for his own credibility in summing up to the jury."[259]

Yet another rationale for the rule linked to the enhanced credibility concern is the "famous lawyer" application of the advocate-witness rule. Since the lawyer's reputation affects the weight given his

testimony, the rule could protect the opposing party from the famous litigator taking advantage of his name, particularly if opposing counsel were not so well known.[260]

The idea that enhanced argument follows attorney testimony as the basis for the advocate-witness rule also has its critics. Dean Wigmore says this reason is rarely advanced and derives its "only importance" because it was raised in Stones v. Byron, the case which created the advocate-witness rule in 1846.[261] If a jury chooses to give unusual weight to a counsel's argument, it is probably due to the counsel's method of presentation or his reputation, and not because of an oath he took at some earlier point in the trial.[262] In a case with the judge as the trier of fact, this rationale evaporates.[263]

Trial advocates almost always know of facts not introduced into evidence. There is no reason to believe a lawyer-witness would improperly argue such facts more often merely because he witnessed them.[264]

Professor Enker found the idea of testimony unfairly enhancing argument not "terribly convincing" not only because it is at odds with the impeachability argument,[265] but also because a witness's credibility, lawyer or otherwise, derives primarily from his reputation.[266]

The famous attorney argument fails because the "personal veracity of the advocate is no less involved" whether it enters the trial implicitly via argument or explicitly from the witness stand.[267]

### 3. The Testifying Prosecutor

Criminal defendants receive the largest benefit of any party to litigation when the advocate-witness rule prevents prosecutor testimony at their trial. "A jury naturally gives to the evidence of the prosecuting attorney far greater weight than to that of the ordinary witness. . . . [T]he practice of acting as prosecutor and witness is not to be approved, and should not be indulged in, except under the most extraordinary circumstances."[268] Prosecutor testimony may circumvent the presumption of innocence, and replace it with a presumption "that public officials do not prosecute men whom they believe are innocent."[269] Prosecutors should not testify, even if the state must accept a delay to bring another attorney into the case. Courts should look favorably upon a defense motion to exclude such testimony on the grounds that it is substantially and more unfairly prejudicial than probative, particularly when the prosecutor attempts to remain as the trial counsel.

## C. PROTECT THE TESTIFYING ATTORNEY

The third major rationale supporting the advocate-witness rule involves a concern for protecting the attorney's dignity and for preventing him from getting involved in a situation too complex to handle competently.

### 1. Arguing His Own Testimony

The desire to prevent an attorney from having to argue his own credibility is one basis for the advocate-witness rule with ties to the United States Supreme Court. The Court's opinion in French v. Hall identified a problem with an attorney commenting on his own testimony in 1886. "In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice [of being advocate and witness in the same case] may be very properly discouraged . . . ."[270] This theme of awkwardness or unseemliness pervades the advocate-witness literature.[271]

Whether to testify or not, and thus expose the advocate to a difficult closing argument, should be a tactical decision similar to the one the attorney should make in assessing his own impeachability.[272] Arguing the attorney's own credibility to the jury should not be the basis for the advocate-witness rule. The jury is able to evaluate the witness's credibility based on his testimony.[273] The degree of harm due to this unseemliness should be one of the decisions an informed client can choose to accept.[274]

### 2. Difficulty in Separating Witness and Advocate Roles

Commentators advance the rationale that a lawyer would have difficulty separating his dual roles as advocate and witness in the same case. As one scholar dramatically states:

> To attempt to be both advocate and witness is to attempt to be both partisan and

> nonpartisan at once. Almost inevitably, the two roles will become mixed; the partisanship of the advocate will be decreased, and the testimony of the witness will become less detached. . . . The dual role is too difficult; the lawyer should not be subjected to such a riptide of demands . . . .[275]

Proponents of this rationale assert that acting in both the capacity of attorney and witness is too difficult for the lawyer to handle well, or even competently.

Professor Sutton is not alone in identifying this difficulty in role separation as one of the bases for the rule.[276] One court even proclaimed this difficulty to be "a tribute to the high calling of advocacy [since it was] virtually impossible . . . to drop the garments of advocacy and take on the somber garb of objective fact-stater."[277]

Nor is Professor Sutton alone in his concern for the trial counsel's emotional health. The trial judge in Baca felt the dual role of testifying as to the client's lack of competency and then arguing the merits of the case in a later session before the trier-of-fact would be "a traumatic experience" and a "philosophical inconsistency."[278]

Concern for the trial advocate is healthy, but it should not override a client's choice of counsel.[279] This alleged basis for the rule is speculative and excessively paternalistic toward trial advocates. The advocate and his client should assess this risk, if any. With client consent and the ineffective assistance remedy available should the counsel's advice or decision prove incompetent, the attorney should proceed as he feels best suits the client's interests.

### 3. Desire to Please the Client

Related to the notion that the dual roles of advocate and witness are too difficult for one lawyer is the rationale that loyalty to his client may cloud the advocate-witness's professional judgment. The attorney relies on the client for his fee and references. Such a fundamental bond can affect the attorney's approach to a case. One court felt that the advocate-witness role put too much pressure on the attorney. On one hand, the attorney would realize that withdrawing would benefit his client. On the other hand, he would want to continue good relations with that client. In this position, the attorney "may -- against his better judgment -- defer to the client's desire for representation."[280]

This rationale for the advocate-witness rule either is an effort to curb the greedy lawyer or it reflects a low estimation of the attorney's ability to convince his client of what is best in handling his case. It is the client's case. Hiring a greedy attorney who makes competent decisions is one of his options. An incompetent, avaricious attorney is a different matter, but not a justification for an advocate-witness rule.

### 4. Embarrassment of Testifying

Another rationale for the advocate-witness rule is based on the presumption that testifying can be as difficult for a lawyer as arguing his own credibility. This basis for the rule "saves the attorney from any embarrassment resulting from his own performance on the

stand."[281] In addition to the trauma of testifying, another reason for this rationale is preventing the mechanical problem of the advocate questioning himself.[282]

Both of these possible bases for the rule do not withstand close examination. There are professional ways for the attorney to question himself.[283] If the embarrassment is because his testimony does not ring true under the hammer of a cross-examination, then the discomfort is appropriate.

An "attorney's role as a potential witness is often part of his role as his client's representative."[284] He actually drafts contracts, monitors meetings, and reviews documents to ensure that they contain the evidence that will free him to be a more objective advocate.[285] An attorney should require no protection if his client chooses both his advocacy and his testimony. The situations concocted to demonstrate the rule's value in this regard are unreasonable or not worth remedying by such an enormous sanction as withdrawal or disqualification of the trial counsel.

## D. PROTECT THE JURY

The fourth major area of support for the advocate-witness rule concerns protecting jury members who may have difficulty sorting out the confusing advocate-witness situation.

### 1. Confusion of Advocate and Witness Roles

The advocate-witness rule simplifies the jury's task. Jurors are lay people. They do not have great amounts of courtroom experience. In spite of the judge's instructions, keeping testimony and argument separate may be difficult.[286] The advocate-witness rule prevents such confusion.

This rationale for the advocate-witness rule is merely a restatement of some of the protect-the-client or protect-the-opposing-party rationales. Because the jury might give too much weight to the advocate-witness's argument,[287] or too little weight to his testimony,[288] this does not support such a strong remedy as the advocate-witness rule provides.[289] For the same reasons those other bases failed to support the advocate-witness rule, this rationale also falls short.

### 2. Faith in the System

One argument for the advocate-witness rule is to preserve the jury's faith in the judicial system. This rationale relies on the fact that jurors will trust a system that conforms to their expectations. They do not expect a lawyer to testify just as they do not expect a judge to favor one party over the other.

This argument is typical of the "unlikely scenarios" often raised to support the need for this rule.[290] No evidence exists that jurors have expectations that trial lawyers will not testify. No evidence exists that jurors believe trial lawyers are

different from other attorneys. Finally, no evidence exists that, even if they have either of these expectations, jurors will lose faith in the judicial system if the attorney testifies. Protecting the jury by treating trial counsel differently from other witnesses should not be the reason to apply the rule to separate the client from his chosen counsel.

## E. PROTECT THE LEGAL PROFESSION

> Rex O'Hurlihan: "You're not a good guy at all!"
> Bob Barber: "I'm a lawyer, you idiot!"[291]
>
> Saul Griswold : "You're still good. You can look me in the eye and lie -- like a lawyer."[292]

These two quotes typify the image of lawyers that proponents of the advocate-witness rule contend the rule exists to prevent.

This fifth major area of support for the advocate-witness rule, fostering a healthy public image of the legal profession, is the most pervasive of any supporting rationale for the rule.[293] "[N]othing short of actual corruption can more surely discredit the profession" than a lawyer being both advocate and witness in the same case.[294] The concern is for perception, whether or not there exists any real harm for the rule to prevent. Perception, rumor, and innuendo of shady lawyer behavior can be as damaging to the profession as true misconduct.[295] "While the [legal] profession is an honorable one, its members should not forget that even they may so act as to lose public confidence and general respect."[296] This rationale concludes that enhancing the profession's image justifies the costs individual parties may pay in

connection with an application of the advocate-witness rule.

1. Weaknesses of the Public Perception Rationale

Public perception is a concern for any profession. It is likely that the public would perceive any witness with a stake in the outcome of litigation as distorting the truth.[297] From a public perception point of view, there is no reason to treat litigating lawyers differently from other attorneys.

> Almost every party to a civil lawsuit (and his agents) is suspect of stretching the truth for his cause. . . . [W]e must be careful not to accept the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct. . . . [The rule] should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules.[298]

Professor Enker gives no credence to the idea that the advocate-witness rule protects the image of the legal profession.[299] The practice of an advocate testifying in a case in which he is the trial counsel is not intrinsically bad.[300] The majority of civil trial witnesses are partisan. The system allows for impeachment to demonstrate their bias to the trier-of-fact.[301] EC 5-9, EC 5-10,and ABA Opinion 339 do not rely on this public perception rationale or even mention it as a consideration in addressing the advocate-witness rule.[302]

The legal profession will meet public criticism as long as it protects unpopular causes and unpopular

parties, but education of the public, not creating new ethical standards, is the appropriate response of the profession.[303] The advocate-witness rule unnecessarily discounts the faith of the public in American legal institutions.[304] No evidence exists that the public is concerned about the practice of attorneys testifying in the same case in which they are trial counsel. Such public concern may be only a theory that attorneys impose upon themselves.[305] Without proof of public concern for this dual role practice, imposing a rule to prevent such concern is unnecessary and unwise, and it amounts to creating a presumption that lawyers lack integrity.[306] "The rule is self perpetuating: it is unseemly for an attorney . . . [who] is trial counsel in the case to testify <u>because</u> there is a rule of ethics to the contrary."[307]

In addition to this general refutation of the public perception rationale for the rule, certain case-specific facts further undercut the need to protect the legal profession's image. This rationale is weaker when the attorney and client have a long-standing relationship because the advocate-witness rule will not erase the perception that the lawyer-witness might lie.[308] Corporate counsel are also subject to continued impeachability, even if they surrender trial counsel duties.[309]

The public perception rationale falters completely when the judge is the trier-of-fact. The public who might observe this conduct by the lawyer-witness is usually the jury.[310] "It is considerably less clear whether members of the public who are not jurors have any knowledge of limitations on an attorney's courtroom

behavior . . . ."[311] Removing the public removes the adverse perception.

Lawyers should be aware of public perception of the profession, but the advocate-witness rule should not apply when other specific ethical and disciplinary rules do not apply.[312] The general public probably does not have knowledge of the parameters of appropriate attorney courtroom behavior. Specifically, the public probably does not realize current ethical rules proscribe advocate-witness testimony in many instances.[313] Thus a public perception that lawyers violate ethical rules by testifying is unlikely.

Application of the advocate-witness rule can adversely affect public perception of the legal profession. For example, it can give the opponent a tactical advantage,[314] and so it is at least as great a disservice to the reputation of the legal profession and the judicial system as allowing the trial counsel to testify. One public perception that does exist is that the law is replete with technicalities that sometimes produce unfair results. Barring a witness from testifying because he is the trial attorney may impress the public as such a technicality. As long as that testimony is consistent with other ethical concerns and evidentiary rules, allowing the lawyer's testimony may enhance public perception of the legal profession.

One major problem the public perception rationale faces is that it represents a misalignment of priorities by the legal profession: appearance over justice. Misapplication of the advocate-witness rule "will often result in achieving propriety in form only,

and sometimes will result in a miscarriage of justice."[315]

The mere existence of the rule can reduce the chances for a just result in the case. The advocate-witness rule may force an attorney to choose a less desireable course of action. For example, the attorney may be reluctant to pursue an approach that would possibly expose him to testifying and thus to disqualification.[316] "[A]n effective ethical code should be more concerned in this instance with attaining justice than with combatting appearances of impropriety."[317] The Court of Appeals for the Ninth Circuit seems to be the only court to address the definition of "appearance of professional impropriety" directly. An activity is improper if it "affects the public view of the judicial system or the integrity of the court, and is serious enough to outweigh the parties' interest in counsel of their own choice."[318] Critically applying this test to allegations that an attorney's testimony adversely affects the legal profession will severely curtail the purported public perception rationale for the advocate-witness rule.

The advocate-witness rule has existed for over 150 years, and it has been in codified form in the United States for over 80 years. If the rule were going to purify the public image of lawyers, it should have done so by now. The quotes from contemporary movies, while not so persuasive as a scientifically conducted survey of the public, tend to counter the theory that the rule effectively serves that purpose. There is no evidence that attorney testimony encourages such lawyer stereotypes.

### 2. Public Perception v. Client Interests

An additional problem with the public perception rationale for the advocate-witness rule is that it relies on "unsubstantiated and incalculable fear of public criticism . . . [which] obscures the often substantial burdens that the rule imposes on the client."[319] That the fear of public criticism is largely speculative may explain why, as of 1970, most courts felt excluding defense counsel testimony or demanding withdrawal would only penalize the criminal defendant[320] as opposed to serving any great public purpose. Proper priorities require an effective ethical code concerned more with attaining justice than with avoiding appearances of impropriety.[321] The advocate-witness rule does not permit proper concern for the costs to the client and the loss of justice associated with its application.

## F. PROTECT THE JUDICIAL SYSTEM

The judicial system is composed of a judge, a trier-of-fact, the parties, their attorneys, the witnesses, and a few other actors, all of whom have roles to play. The advocate-witness rule prevents unnecessary disruption of the judicial system associated with one person filling more than one role.

### 1. Preserves the Traditional Structure

"Experience shows that the adversary system functions best when the role of Judge, of counsel, of witness is sharply separated [sic]."[322] With this

statement, the Court of Appeals for the Fifth Circuit succinctly defines this rationale for the advocate-witness rule. Allowing a trial counsel to also act as witness in the same case tends to disrupt the normal flow of the trial.[323] Disqualification will therefore better serve the ends of justice by protecting the judicial system.[324]

The central reason for this basis for the advocate-witness rule rests on the assumption that there is an intrinsic conflict between the roles of advocate and witness.[325]

> Argument is argument. You cannot help paying regard to their arguments if they are good. If it were testimony you might disregard it, if you knew that it were purchased. There is a beautiful image in Bacon upon this subject: testimony is like an arrow shot from a long bow: the force of it depends on the strength of the hand that draws it. Argument is like an arrow from a cross bow which has equal force though shot by a child.[326]

The rationale that the advocate-witness rule guards the integrity of the judicial system is flawed. That witnesses are to be neutral observers of fact and that the advocate's role is antithetical with that of a witness are "two commonly presented fictions."[327] A good lawyer makes himself a witness[328] as he prepares documents, reviews actions, and monitors the conduct of his client. Denying an attorney, who did this work to prevent successful suits against his client, the right to also defend that client in court would be tantamount to enforcing the advocate-witness rule by "establish[ing] a system of barristers and solicitors that would divide the functions of general and trial representation."[329] Even the British are reevaluating this bifurcated system.[330]

Another basic flaw in the protect-the-system rationale is that it assumes that applying the rule does not hurt the system. Enforcing the rule can also disrupt the system, as when opposing counsel makes a motion to disqualify a trial counsel on the basis of the advocate-witness rule primarily, if not solely, to gain a tactical advantage.[331]

This rationale also has its priorities confused. The rationale of protecting the system "assumes that the structure of the system is paramount to its essential purpose. A litigant's right to call relevant witnesses and to present a complete case should not be sacrificed for the sake of trial convenience."[332]

2. Danger of Improper Argument

One rationale for the advocate-witness rule contends that applying the rule precludes improper argument in the form of testimony and avoids the inherent advocate-witness role conflict. A witness testifies to what he believes. A lawyer's belief in his argument is irrelevant.[333] There exists a danger that an attorney will not be able to keep advocacy out of his testimony.[334]

Advocates can create "facts" not otherwise in evidence in the jury's mind through their arguments.[335] Advocates who have witnessed relevant events are more likely to create such improper "facts" in the mind of the trier-of-fact. Such attorney-created "facts" may or may not be true, but since they are not in evidence, they are impermissible in argument. The advocate-witness rule forecloses an opportunity for such improper argument. "The prohibition against appearing

as both advocate and witness eliminates the opportunity to mix law and fact."[336]

Improperly creating such "facts" is not limited to closing argument. The potential exists any time the lawyer-witness speaks. United States v. Cunningham illustrates an application of the advocate-witness rule to foreclose an attorney from the opportunity to improperly create "facts" during cross-examination. In this case, plaintiff's counsel announced plans to call the opposing lawyer's secretary on a collateral issue of the authenticity of a memorandum for record. The plaintiff's counsel also made a motion to disqualify the defendant's attorney on the basis that his testimony would be necessary "to rebut, corroborate, or explain" his secretary's testimony as to what that defendant's counsel had said to her, an issue tangentially related to the memorandum.[337]

In disqualifying the defendant's counsel, the court acknowledged that the defendant, who was also a lawyer, knew the value of his counsel's testimony and waived it. But this waiver did not win the motion for the defendant; the court worried that his counsel could not "suggest one of the [innocent] possibilities [for what the secretary heard] even on common sense grounds, directly or indirectly, without implicitly testifying as an unsworn witness."[338] In this court's opinion, a potential witness-counsel could improperly testify by merely asking a question related to the area to which he could testify. A non-witness counsel could ask the same question with no ill effects to the system. The same question colored by the witness potential of the asking lawyer could have such an unfairly prejudicial impact upon the jury, regardless of the witness's

answer, that such impact warranted disqualification of the potential witness trial counsel.[339] The court concluded that allowing the lawyer to stay on the case but not testify was actually worse than allowing him to stay on the case and testify. In the latter instance, he could then be cross-examined and impeached.[340]

The danger of improper argument may increase when the trial counsel has personal knowledge that would make him a relevant witness. But this risk increases any time a trial attorney is familiar with facts not in evidence.[341] Attorneys almost always are aware of many facts that do not enter into evidence for a variety of reasons. There is no reason to presume that lawyers who testify will argue facts not in evidence more often than lawyers who do not testify.[342] If the advocate's argument strays from the record, his opponent may request appropriate relief from the court, or may possibly obtain a reversal.[343]

The existence of the advocate-witness rule can actually lead to increased opportunity for improper argument. The argument is only improper because the evidence the attorney has is not part of the record. It is not part of the record, assuming it is otherwise admissable, because the advocate-witness rule blocks the lawyer's testimony on one hand or participation as trial counsel on the other. Eliminate the advocate-witness rule and the lawyer may testify if no other evidentiary concern precludes it. The improper argument rationale largely disappears if the advocate-witness rule does not apply.[344]

### 3. Danger of Frivolous Litigation

Another limited rationale for applying the advocate-witness rule is to protect the system from frivolous litigation by pro se attorney litigants. The trial counsel could not be both advocate and witness but for the fact he proceeds pro se. Denial of attorney's fees would remedy a situation in which "a lawyer representing himself or herself lacks the objectivity necessary to provide a check against groundless or frivolous litigation."[345]

This use of the advocate-witness rule to protect the judicial system has failed where raised. The advocate-party-witness only receives attorney's fees if he prevails. If he prevails, the litigation was not groundless.[346] Therefore, this possible rationale for the advocate-witness rule is without merit.

### 4. Avoid Attorney Credibility Contest

Another alleged threat to the judicial system avoided by the advocate-witness rule is the degeneration of the trial into a credibility contest between opposing counsel.[347] The argument of the attorneys "would be judged in an improper frame of reference"[348] if they had also testified.

This rationale is merely a restatement of the theories that the opposing counsel requires protection from a famous advocate[349] or that the jury requires protection from confusion of the advocate and witness roles.[350] For the same reasons it was unpersuasive in those contexts, it fails here.

### 5. Sequestration Problems

Another supposed systemic problem the rule averts is that of sequestration of witnesses. "The rule excluding witnesses from the courtroom may be invoked, yet the advocate-witness obviously must be allowed to remain."[351] No court relies on this basis alone to support its enforcement of the advocate-witness rule. Not all witnesses are excluded from the courtroom, even though the opposing counsel requests sequestration. Experts are allowed to remain in the courtroom to assist the trier-of-fact.[352] This treatment is not limited to experts.[353]

In cross-examination, opposing counsel can exploit the fact that the advocate-witness was present throughout other witnesses' testimony, and the trier-of-fact can discredit the attorney's testimony on this basis as appropriate. The advocate-witness rule cannot stand on this sequestration problem for its support.

Striving to protect the system with the advocate-witness rule might produce "more harm than good by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits."[354] The advocate-witness rule is cumulative with other available devices in place to protect the judicial system, such as cross-examination and remedies for improper argument. Where those other prophylactic devices do not reach, the advocate-witness rule is unnecessary.

The bases for the advocate-witness rule are many, and they are impressive on their face. When courts combine several of the bases for the advocate-witness rule to support their denial of advocate testimony, the

result appears to be just. But the strength of each rationale fades in the light of reason and under close examination. Though the legion of rationales for the advocate-witness rule seems impressive, a truly necessary rule would require fewer and less ingenious justifications.[355]

## IV. PROBLEMS WITH THE RULE IN GENERAL

There are many problems with the advocate-witness rule which transcend the attempts to codify it. Its relatively short history has generated little precedent.[356] A lack of clear supporting rationales makes codification difficult, because the codes have no clearly defined goals.[357] These flawed attempts at codification lead to divergent applications of the rule.[358] Lawyers rarely deliberately flaunt ethical rules, to include the advocate-witness rule. Violations result from uncertain standards.[359]

The problems with the advocate-witness rule originate in a rule without firm roots. These problems persist despite efforts to codify and apply this uncertain rule.[360] Those problems include, for example, a conflict with the right to counsel, the effect on the attorney-client relationship,[361] and the abuse by opposing counsel of an ethical rule as a tactical weapon. There may be a need for the advocate-witness rule, but a decision to keep it should not ignore its serious negative aspects.

## A. RIGHT TO COUNSEL

### 1. The Accrual of the Right

One difficulty attorneys have with the advocate-witness rule is that the right to counsel in criminal cases attaches relatively late in some attorney-client relationships. The right to counsel under the sixth amendment attaches at or after the initiation of adversary proceedings.[362] The indictment marks the beginning of adversary proceedings for the purpose of a criminal defendant's attorney rights.[363]

The problem with this definition of "initiation of adversary proceedings" co-existing with the advocate-witness rule is that the state can call a suspect's attorney to testify before a grand jury. The substance of this testimony may be against the interests of his client but addressing matters not within the attorney-client privilege. Should an indictment issue on matters to which the attorney testified, that attorney ought to know that he is likely to be a state's witness. The advocate-witness rule then precludes him from accepting the trial counsel position in such a case, even if conflict of interest concerns are satisfied.[364]

Courts tend to discount the fact that the advocate-witness rule in tandem with grand jury testimony might deprive a client of his chosen advocate for trial:

> Before disqualification can even be contemplated, the attorney's testimony must incriminate his client; the grand jury must indict; the government must go forward with the prosecution of the indictment; and,

> ultimately, the attorney must be advised he will be called as a trial witness against his client. As a court, we decline to speculate that all those events will occur. . . . Disqualification is not inevitable.[365]

If the advocate-witness rule did not exist, or the right to counsel accrued to the client earlier in the process, then grand jury testimony would not provide the prosecutor with a tool to remove opposing counsel from the trial counsel role.

In both civil and criminal cases, attorneys cannot ignore the risk of their possible disqualification. With the advocate-witness rule limiting a client's choice of trial counsel before that right to counsel even accrues, a lawyer may tailor his approach to a client's situation to preserve his ability to try the case. This impact of the rule causes the attorney to consider such factors as "the value of the firm's general representation of the client, the detriment to the client of the firm's disqualification from the particular litigation, and the impact of and harm to the attorney-client relationship."[366] None of these factors has anything to do with justice or the merits of the case. They represent only transaction costs associated with the presence of the advocate-witness rule.

This fear of the advocate-witness rule can harm the judicial system, as well as the client and the opposing party. By choosing not to take certain actions or become personally involved to protect his client's counsel choice, a lawyer might actually reduce the chances of settlement of the issue.[367]

"The thrust of [the advocate-witness rule], quite simply, was that a lawyer's efforts on his client's

behalf should be exercised independently and without compromise to that end."[368] This goal is admirable, but the advocate-witness rule actually forces the attorney to consider compromising his client's interests in the merits of his action well before trial. An attorney balancing the better action for his client against the possibility that the client may lose his representation is balancing his client's legal interest against inconvenience and economic harm the advocate-witness rule may impose in his case. An attorney who is primarily concerned for his fee might actually harm a client's case.

Concern for the advocate-witness rule does not disappear once the litigation begins. The rule could present an advocate with a dilemma as he determines what evidence to introduce at trial. On the one hand, some evidence could lay a foundation for the opposing counsel to try to force his opponent to withdraw and testify, which could adversely affect his client financially and at trial. On the other hand, withholding such evidence could reduce his client's chances of success.[369] The less sympathetic the jurisdiction is toward the hardship that disqualification would impose on the client, the more important the advocate-witness rule considerations become.[370] The attorney has to consider those matters unrelated to the just outcome of this trial.[371] The real issues in the case pale commensurately, adversely affecting the client and reducing the opportunity for a correct result on the merits of the case.

Through all of these calculations, the attorney remains aware of possible ineffective assistance allegations each time he makes a decision involving the

advocate-witness rule. A decision not to testify could be construed as ineffective assistance.[372] Should he fail to withdraw when listed by the opposing counsel as a possible witness, that could form the basis for an appeal alleging ineffectiveness.[373] His advice to his client on advocate-witness issues could draw his competency into question.[374] Some courts believe the attorney would use the advocate-witness rule to build incompetency into the record deliberately.[375] These sorts of concerns could lead an attorney to back away from the edge of zealous representation to avoid allegations of incompetency.

### 2. Importance of the Right to Counsel

The attorney-client relationship is often important long before the right to that attorney accrues to the client. Courts should give greater deference to the attorney choices clients make long before they are haled into court.

The Court of Military Appeals gives more weight than other courts to allowing a party the counsel of his choice, as opposed to a right to competent counsel. "Defense counsel are not fungible items. Although an accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with counsel in the absence of demonstrated good cause."[376] Though the Baca case addressed a situation long past the civilian equivalent of indictment, that court's words should reach beyond the post-indictment criminal justice situation. Absent demonstrated good cause, no client should be stripped of his attorney.[377]

Many courts and commentators share the Court of Military Appeals's concern.[378] "Important Sixth Amendment right to counsel principles are at issue in this situation. [The defendant] has an unquestioned right to self-representation. . . . A corollary to that is representation by counsel of his own choosing."[379]

### 3. Resolving the Conflict

Tension between the advocate-witness rule and the usual practice of allowing a party to choose his trial advocate is obvious. One approach courts take to resolving this conflict is to rely on the fact the right to counsel does not equate to a right to counsel of choice.[380]

Other courts take a more enlightened approach and try to preserve a client's counsel choice. The Court of Appeals for the Ninth Circuit said, "Merely requiring a defendant's lawyer to testify does not alone constitute a material interference with his function as an advocate or operate to deprive the accused of a fair trial."[381] The Court of Appeals for the Second Circuit has proposed a balancing test. "[T]he trial judge may rule in limine that the [advocate's testimony] is not admissible, perhaps because its probative force does not justify a resulting disqualification of counsel."[382] Ruling the testimony inadmissible forecloses the advocate-witness rule issue and leaves the decision to withdraw and testify with the lawyer.

The Court of Military Appeals has announced a drastic reduction in the reach of the advocate-witness

rule. "When [advocate testimony] is on a procedural, administrative, or collateral matter, he or she ordinarily need not be disqualified as counsel."[383] The court has reversed lower courts that applied the advocate-witness rule to disqualify defense counsel who testified on issues of competency to stand trial[384] and speedy trial.[385]

While the right to counsel does not mean a right to a particular counsel, the judicial system normally contemplates a party hiring the counsel he selects. The advocate-witness rule erodes this freedom of choice. The Court of Military Appeals effectively has narrowed the advocate-witness rule, when the application of that rule would deprive a defendant of his defense counsel, to the merits of the case. Other courts are trimming the advocate-witness rule's reach. Only eliminating the rule would completely restore a client's right to proceed to trial with the lawyer of choice.

## B. EFFECT ON THE ATTORNEY-CLIENT RELATIONSHIP

The timing of the accrual of the attorney right creates a gap between the client's right to his attorney and the grand jury. This gap, in tandem with the advocate-witness rule, allows a prosecutor to terminate the attorney-client relationship before indictment by making the lawyer a witness for the state. The adverse impact of this prosecutorial power pervades the attorney-client relationship. Pre-indictment risks plus the advocate-witness rule "drive a wedge between attorney and client; to deprive

criminal defendants of all confidence in the efficacy of their right to counsel; and even to deprive defendants of their counsel of choice, through reconstitution of that counsel as a witness for the prosecution."[386] Because the right to the defense lawyer does not accrue until adversary actions begin, the client's freedom to disclose matters to his lawyer before that time is chilled by the potential reach of a government subpoena.[387]

In civil cases there is no timing issue, but the advocate-witness rule itself serves to impede attorney performance.

> [T]he rule purposelessly interferes with the lawyer-client relationship and inhibits legitimate action by counsel in the planning and preventative stages when the transaction is taking place, and throughout the litigation process. The rule unnecessarily complicates counsel's decision in representing a client, since a thoughtful attorney now has to keep in mind that as a result of any action he might take he could become a participant witness and thus disqualify [himself]. . . .[388]

Large multi-service law firms are likely to be involved in many aspects of the client's personal and professional life. The nature of such firms increases the chance that a client's trial counsel will also be a witness.[389] As a result, the advocate-witness rule impedes the lawyer's ability to offer effective, cost-efficient legal services to the client.[390]

The advocate-witness rule not only weakens the attorney-client relationship, but also it may prevent ethically permissible relationships from forming. In addition to affecting the first lawyer's pretrial performance, fees promised or paid might inhibit the

client's hiring a second lawyer if the rule applied in his case.[391] Similarly, the possibility of the rule's application might cause the first lawyer the client approached to refuse employment he ethically could have accepted. This overly cautious application of the rule and its exceptions unnecessarily deprives the client of his counsel choice.[392]

Client consent to the risks associated with advocate testimony is often posed as a way to soften the harsh impact of the advocate-witness rule.[393] Generally, if the rule must exist, this suggestion has merit, but client consent does not remove the chilling effect of the advocate-witness rule on attorney-client relations. "The very act of seeking consent, which requires that the attorney explain to the client the nature of the potential conflict and its effect on the attorney's own interest, may itself create suspicion and drive a 'wedge' between the attorney and the client."[394] In the civil context, the client is equally unlikely to derive confidence from the attorney's explanation of the risks of impeachment and impaired advocacy.

"The attorney-client privilege and the work product doctrine, as well as the sixth amendment guarantee of effective assistance of counsel and the ethical mandates of confidentiality, competence, and loyalty, all serve to preserve and foster [the attorney-client] relationship."[395] The advocate-witness rule stifles the relationship these measures exist to nurture.

## C. THE RULE AS A TACTICAL WEAPON

Disqualifying an opposing counsel can significantly improve a party's position in litigation.[396] A new counsel may not be as good as the first attorney. The client may withdraw his cause of action.[397] The additional cost and delay may force a favorable settlement.[398] The advocate-witness rule is a means to gain this advantage by forcing the opposing counsel from the case.

### 1. Tactical Use Exists

"[C]ounsel can approach the [advocate-witness rule] as another arrow in his quiver of trial tactics."[399] Other courts have reported the tactical use of the advocate-witness rule.[400] "Because the rule is applicable and the court, as enforcer, is present, the tactical value of the rule flowers when a dispute enters the litigation context."[401] Tactical use of the rule is widespread.[402] Increased tactical use results in increased cost to both the client and the judicial system.[403]

### 2. The Role of the "Substantial Hardship" Exception

Both the Model Code[404] and the Model Rules[405] allow an exception to the advocate-witness rule when disqualification of counsel would work a substantial hardship to the client. "This [substantial hardship] exception could work to alleviate the use of [disqualification] as a tactical weapon because an attempt to have opposing counsel disqualified is most

likely to occur when that counsel is for some reason irreplaceable."[406] If courts read this exception broadly, it could serve to limit tactical uses of the advocate-witness rule. Most courts have not so construed the substantial hardship exception of either codification.[407] The prevailing view "plays right into the hands of a litigant who wants to delay and harass."[408] The "substantial hardship" exception does not prevent tactical use of the advocate-witness rule as courts currently apply it.

### 3. Timing the Tactical Use

Because "a client may be threatened with the loss of his counsel as early as pretrial discovery, and as late as the day set for trial or even during trial,"[409] tactical uses of the rule reach beyond delaying the litigation.[410] New counsel may be unobtainable because of expense,[411] and the cost of the defending the motion to disqualify may be quite high. While the advocate defends the motion, he is not attending to the merits of the case.[412] The disqualification motion can increase cost and delay by opening new discovery areas focusing on whether the attorney should be a witness.[413] Attorneys may also avoid raising the disqualification motion in the hope that the advocate-witness will be more easily impeached.[414] Finally, the Court of Appeals for the Ninth Circuit stated a concern that counsel might not make the motion at trial in order to save it for "post facto" attacks on adverse judgments.[415]

Tactical timing issues accrue not only to the attorney opposing the advocate-witness. One federal district court appropriately feared "deliberate abuse

by defendants and their attorneys, who may seek to avoid disqualification in cases of conflict of interest in the hope of later seeking reversal of a conviction or withdrawal of a guilty plea."[416]

### 4. Prosecutor's Tool

The prosecutor can separate a defendant from his chosen trial counsel through use of the advocate-witness rule.[417] Such action need not terminate the attorney-client relationship to adversely affect it.[418] This prosecutorial weapon is so powerful that the American Bar Association, in a resolution passed by the Criminal Justice Section and approved by the House of Delegates, states that prosecutors "shall not subpoena . . . an attorney to a grand jury without prior judicial approval . . . to [acquire] evidence concerning a person who is represented by the attorney/witness."[419]

While the advocate-witness rule is a weapon for the prosecutor, it may be less so for the defense.[420]

> The prosecutor and his deputies have no financial interest in the outcome of criminal prosecutions; they have a duty to seek justice, not merely to convict; and they must disclose to the defense counsel any evidence that tends to negate the guilt of the defendant, mitigate the degree of the offense, or reduce the punishment.[421]

The advocate-witness rule as currently applied favors the prosecution.[422] This advantage unnecessarily tips the scales of justice.

### 5. Court Responses to Tactical Use of the Rule

Courts apply the advocate-witness rule even if tactical reasons motivated the motion to disqualify. In one case, the matters to which the attorney allegedly would testify had been witnessed by others, and were only hearsay on a collateral issue. The attorney assured the court that his testimony was unnecessary, but offered to withdraw if discovery proved otherwise. This court rigidly applied the rule and disqualified the attorney, stating it could not "say with any degree of security or in good conscience that [the attorney] will not be called as a witness."[423]

Though the majority of courts may follow a similar approach in applying the advocate-witness rule, some have tried to reduce its tactical value. The Court of Appeals for the Ninth Circuit found that the opposing counsel's motive for the motion was to force the potential advocate-witness to withhold damaging evidence that might make that advocate's testimony necessary and thus force his withdrawal.[424] The court balked at the prospect of applying the advocate-witness rule so broadly as to "grant disqualification whenever counsel threatens to call opposing counsel,"[425] and decided that, because "of this potential abuse, disqualification motions should be subjected to 'particularly strict judicial scrutiny.'"[426]

### 6. Client Consent as a Solution to Tactical Use

Client consent cannot cure all the problems associated with the advocate-witness rule.[427] To the extent courts allow the advocate and his client to

decide to continue the representation and to testify, the tactical abuse problem will be eliminated.[428] "The result is that the responsibility for the tactical conduct of each attorney's case remains where it properly belongs -- with the litigant and the counsel of his choice, not with the opposition."[429]

The tactical uses of the advocate-witness rule are only possible when such a rule is enforced by the courts. A better solution would be to let the bar address attorneys who violate the rule.

## D. CALLING OPPOSING COUNSEL

### 1. Standards for Calling Opposing Counsel

There are times when the opposing party wants to call the opposition's lawyer as a witness. This situation is not the same as when the opposing party moves for disqualification because the opposing advocate ought to be a witness. One court states that being called to testify by the opposing counsel "is a compliment [because it] present[s] him to the jury as worthy of their confidence in spite of conflicting interests."[430]

Most courts closely scrutinize this situation.[431] One test to determine whether the testifying attorney should withdraw is whether the testimony will be "crucial or necessary."[432] Another standard calls for the evidence from the opposing counsel to be "necessary and unobtainable from other sources."[433] When the subpoena is for a government prosecutor, one test applied is whether the testimony is "unavoidably necessary" because "all other sources of possible

testimony have been exhausted."[434] A similar test applies when the prosecutor desires to call the defense counsel.[435]

These standards parallel those a court might apply under Rule of Evidence 403.[436] To apply such standards each time an opposing advocate calls his counterpart to testify is to deny the attorney the right to plan his own case, subject to applicable evidentiary concerns. A trial advocate decides which witnesses he needs to prove his case. If the court should find some of these witnesses cumulative, the advocate, not the court, should determine which of the cumulative witnesses he will use.

2. A Hypothetical Shows the Rule is Superfluous

Assume a rape victim is in the prosecutor's office telling her story to the prosecutor. Also present is the prosecutor's secretary, who is known as a forgetful gossip, prone to exaggeration, and who is hard of hearing.[437] The victim tells the prosecutor she is unable to identify her assailant because it was dark, he wore a mask, and she was too frightened to look at him. Later, after psychiatric assistance, the rape victim views a lineup and identifies the defendant. Forensic testing neither incriminates nor exculpates the accused. Prior to trial, the prosecutor discloses the prior inconsistent statements the victim made in his office. At trial, the victim testifies that she could never forget the man who raped her. Time stood still. His mask slipped down. The moon was full, and passing car lights illuminated his leering countenance.

To impeach the victim, the defense counsel seeks

to call the prosecutor.[438] He explains to the court that the prosecutor is by far the more credible of the available witnesses to the victim's earlier statements. The prosecutor objects, claiming that the secretary was present, therefore he need not testify.

Assume that the defense counsel moved to disqualify the prosecutor as a trial counsel under the advocate-witness rule.[439] The cumulative witness standard applied in most jurisdictions[440] would force the defense to rely on the poor impeachment witness, the secretary. The prosecutor need not make the objection he really has, which is that impeachment from the prosecutor's own mouth is substantially more unfairly prejudicial than probative of the victim's lack of truthfulness. The proposed testimony would show a lack of faith in the victim instead of merely recounting her statements in his office. The secretary can as accurately recount the words the victim spoke.

Even if the advocate-witness rule did not apply, the court could reach the same result. In addition to his Rule of Evidence 403 objection, a confident prosecutor could offer to stipulate in fact as to what the victim said, or he could offer to limit his cross-examination of the secretary, as appropriate.

The prosecutor has an excellent chance of avoiding the witness stand with these evidentiary objections and testimonial substitutes. Courts frown upon the practice of calling opposing counsel "because of the possibility of delay tactics by unscrupulous counsel" and because courts seek "the fairest and most equitable result."[441] Courts are quite properly concerned with the implications of this practice upon the attorney-client privilege and the right to counsel.[442] They fear

that calling the opposing counsel will impugn the integrity of the judicial process.[443]

With the generally disapproving attitude courts have toward the practice of one attorney calling his counterpart to the witness stand, evidentiary techniques could generate the same result as the advocate-witness rule in a fashion carefully tailored to the needs of each case.[444] They impose no arbitrary barriers to the testimony of any witness with knowledge of a material fact relevant to the case. They are preferable to a superfluous and arbitrary application of the advocate-witness rule.

## E. FACTORS UNDERLYING DISQUALIFICATION

### 1. Generally

Courts and commentators addressing the issue of attorney disqualification often identify factors they feel are relevant, but there is no single list of such factors that courts and attorneys can rely upon to guide their conduct in the area of the advocate-witness rule. A good rule would identify "the clearly relevant factors, in order that lawyers and judges, making necessarily hasty decisions amid the pressures of litigation, may rely upon [the rule] as a proper guide to professional responsibility."[445]

The factors that courts and commentators have proposed vary widely. The reasons for disqualifying a counsel in a given case usually follow the rationales for the rule, though it is unusual for the court or author to cite more than three of these rationales in any one case or article.[446]

The Model Rules of Professional Conduct seek to supply a clear list of factors through the comment to Rule 3.7, which Professor Wydick summarizes as:

> (1) The nature of the case.
> (2) The importance and probable tenor of the lawyer's testimony.
> (3) The probability that the lawyer's testimony will conflict with that of other witnesses.
> (4) The foreseeability to both parties that the lawyer would have to testify.
> (5) The effect of disqualification on the lawyer's client.[447]

Professor Wydick would add a sixth factor: "Who will be the trier of fact?"[448] This factor rests on the idea that a judge is sufficiently able to avoid the potential pitfalls of attorney testimony. Protecting him through application of the advocate-witness rule is not so necessary as protecting a jury. With the exception of Professor Wydick's suggestion, each of these factors is subjective. The list does not weight the factors. Many of the factors are vague, such as "nature of the case." The Model Rules should at least lead courts to consider these factors in each case, and perhaps through repeated litigation the more nebulous concepts in the list of factors will acquire more precise meanings.

Factors more objective in nature would be more useful to obtain uniform application of the rule and to allow appropriate preventive measures by attorneys facing an advocate-witness situation. In addition to the identity of the trier-of-fact, such a list might include the timing of the motion, the length of the attorney-client relationship, the nature and extent ot the attorney's involvement in the litigation, the ability of the client to obtain substitute counsel, the

extent of the attorney's interest in the litigation's outcome, and the circumstances that made the advocate a potential witness.[449]

To this list could be added whether the testimony was on the merits of the case or merely on a procedural issue; whether the advocate-witness counsel had offered fair testimonial substitutes, which the opposing counsel refused; whether the opposing counsel had offered fair testimonial substitutes, which the advocate-witness had refused; whether the testimony covered factual matters or would also allow the advocate-witness to interject opinion; whether a co-counsel will perform the direct examination as opposed to some sort of narrative by the advocate-witness,[450] and whether, in the criminal context, the defense counsel or the prosecutor wants to testify.

### 2. The Non-jury Situation

Of all of these factors, if the testimony would be before the judge alone, then that fact alone may well deserve controlling weight in determining whether or not to invoke the advocate-witness rule. A judge is unlikely to be confused or misled by an attorney filling both the advocate and witness roles in the same case.[451] When a judge is the trier-of-fact, "there [is] no danger that the trier-of-fact could not distinguish between testimony and advocacy."[452] The Court of Military Appeals found the fact that the attorney testimony would be "out of the [jury's] presence" a factor in concluding that "neither the defense nor the prosecution would have been disadvantaged" by the advocate testifying in response to questions from his

co-counsel.[453] Another court found that the fear that an advocate who also testified would be too persuasive, and therefore unfair to the opposing party, was not relevant to a nonjury trial.[454] When there is no jury, the need to protect the profession's reputation from public criticism loses much if not all of its force.[455] The experience of the trial judge can protect the client from any undue impeachment weight associated with the witness's status as trial counsel in the case.[456]

Testimony before the judge alone could arise in two ways. First, the trial judge could be the trier-of-fact and the attorney's testimony would be on the merits of the case. Second, in a jury trial, the issue on which the attorney would testify could be collateral or procedural, in which case the judge alone would hear the testimony and rule accordingly out of the jury's presence. In this second instance, there seems to be no good reason to support applying the advocate-witness rule, absent unusual circumstances. As the Court of Military Appeals stated: "In some situations, a lawyer may find it necessary to testify. When it is on a procedural, administrative, or collateral matter, he or she ordinarily need not be disqualified as counsel."[457]

In any list of factors providing guidance as to situations in which the advocate-witness rule should apply, the absence of the public in the form of the trier-of-fact should be controlling, absent extraordinary circumstances.

## F. COURTS ENFORCING AN ETHICAL RULE

Evidentiary rules are not the same as ethical rules. Courts routinely decide evidentiary questions. Evidence is a part of every trial. There is a set of evidence rules and, generally, an extensive body of law defining each of these rules. Ethical matters, on the other hand, rarely arise at trial. Courts usually leave ethical matters to the bar. The advocate-witness rule is unusual because it has no evidentiary counterpart, yet courts persist in applying it.

The main reason for courts avoiding enforcement of the ethical rule against a testifying advocate is that "it would be unfair to penalize the client for an ethical violation committed by his attorney."[458] While a client must suffer if his attorney errs, for example by allowing a statute of limitations to run, courts should not jeopardize the client's interests in order to discipline the attorney for an ethical violation of the advocate-witness rule.[459]

In addition to harming the client when they punish his offending counsel, courts that apply the advocate-witness rule also affect the lawyer, the judicial system, and the local bar. When a court takes adverse action toward an attorney, and therefore his client, for an apparent violation of this ethical standard, it does so without the benefit of "the full opportunity afforded by a hearing to ascertain whether under the facts" the attorney violated the rule.[460] Most "courts will allow attorneys to testify on behalf of their clients, but they try to discourage it."[461] "A lawyer, like all other citizens, has a civic duty to testify regarding relevant, unprivileged facts which will aid

the court in arriving at a proper judgment."[462] If he has breached an ethical duty in remaining as trial counsel while providing such testimony, it should be for the bar to take any adverse action required.[463]

Conflict of interest situations are distinct from advocate-witness situations, because the lawyer's former client cannot protect himself. In conflict situations, the court must prevent a lawyer from ignoring the confidentiality rights of a former client to represent his current client. The opposing party receives an incidental benefit. When the attorney violates the advocate-witness rule, judicial enforcement directly benefits the opposing party at the expense of the client, who is supposedly one of the beneficiaries of that rule.[464] The advantage of resolving the alleged ethical violation at a bar disciplinary hearing is that the attorney, not the client, bears the costs and the consequences.[465]

## V. CONCLUSION

Ideally, a rule proscribing activities as important as testifying in court and representing a client's interests at trial would be subject to no misunderstanding.[466] It would have a long and distinguished history. The rationales behind this rule would be so clear that their validity would brook no dispute. Problems applying such a rule would be few, and it would not offer itself as a weapon to one party while looming as a liability to his opposition. Ultimately, there would be little doubt that the ends obtained through such a rule justified the costs associated with its application.

The advocate-witness rule, codified or not, in no way meets this definition of ideal. Its history is relatively short and of checkered origin.[467] The rationales allegedly supporting the rule are many, although each offered rationale has detractors with persuasive arguments arrayed against it.[468] The current version of the rule cites two principal supporting rationales,[469] but commentators have rejected both repeatedly.[470] It has no unassailed historical foundation on which to base the significant impact it has on litigation.

Also far from ideal are the definitional problems courts have encountered in applying this rule.[471] Having no definite rule makes the judge's role unclear. The rule lends itself to tactical use by any party who cares to raise the motion.[472] In many cases, a motion to disqualify counsel under this rule adversely affects the advocate-witness preparation for trial, whether or not it ultimately forces that lawyer from the case.[473]

The advocate-witness rule costs are very high. It impedes the client's right to select his counsel,[474] as well as his relationship with that counsel.[475] A judicial process encumbered by the rule consumes more of the client's[476] and the court's resources.[477] The trier-of-fact may be deprived of competent, relevant evidence.[478] The very existence of the rule insinuates that lawyers cannot be trusted; it arguably libels the entire profession.[479]

The rule's principal benefits to the judicial system are prevention of a systemic breakdown through confusion of the trier-of-fact[480] and preclusion of unduly weighted argument or testimony by the advocate witness.[481] Rule of Evidence 403 and the court's

supervisory power achieve this same result when the probative value of advocate-witness evidence is substantially and unfairly outweighed by its prejudicial effect.[482]

The benefit to the client is to protect him from himself,[483] an unscrupulous attorney,[484] and an advocate rendered ineffective because he fills two roles.[485] A client wronged by his attorney has remedies such as ineffective assistance of counsel that can make him whole should justice require that result.[486] The judicial system allows the client to consent to many aspects of the trying of his case.[487] He may even choose to surrender many of his constitutional rights by pleading guilty. Through informed consent, the client should be able to waive those aspects of the advocate-witness rule allegedly benefiting him. The client does not need the protection of an advocate-witness rule.

The rule also supposedly serves to protect the profession from adverse public opinion.[488] Bar associations, not courts, can and should discipline their own members who behave unprofessionally.[489] Offering relevant and admissible testimony is neither unethical nor unprofessional. Only if advocate-testimony violates an evidentiary rule, not the advocate-witness rule, should courts take measures to prevent it. Only if the attorney's testimony violates an ethical rule, other than the advocate-witness rule, should bar associations take measures to punish him.

The price of the rule is dear. The minimal benefits of the rule are available through other less costly means. The advocate-witness rule should be abolished, and the hazards of advocate testimony should be handled through these alternative procedures.

## ENDNOTES

1. See infra notes 46-47 and note 159 and accompanying text.

2. See infra note 15 and accompanying text.

3. See, e.g., infra notes 137-146.

4. See infra note 30 and accompanying text.

5. See infra 46-47 and accompanying text.

6. See infra note 159 and accompanying text.

7. The scope of this analysis is almost exclusively limited to United States federal court decisions. Each state has a body of law in this area, and this analysis incorporates state court decisions that add to the analysis.

8. See infra notes 199-355 and accompanying text.

9. See, e.g., infra notes 203-249 and accompanying text.

10. See infra notes 362-385 and accompanying text.

11. See infra notes 386-395 and accompanying text.

12. See infra notes 396-429 and accompanying text.

13. See infra notes 445-457 and accompanying text.

14. Unlike lawyer-client privilege, for example. See, e.g., Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 502 [hereinafter Mil. R. Evid. 502].

15. 6 J. Wigmore, Evidence § 1911, at 773-74 (Chadbourn rev. ed. 1976). (Dean Wigmore discounts an allegation that the first instance of such exclusion was in 1535 in Sir Thomas More's Trial, 1 How. St. Tr. 386 (1535) by explaining that the impropriety by counsel in that case was a violation of attorney-client privilege and conflict of interest rules, both of which were "illegal and indefeasible").

16. Granon v. Hartshorne, 10 F. Cas. 965, 966 (S.D.N.Y. 1834) (No. 5689). It should be noted that in this case the court had reason to believe lesser credibility was warranted since the attorney who wanted to testify had tricked an admission from the opposing party. Even today a statement a lawyer weasels from a lay person might be viewed with suspicion. The court said neither English nor United States common law made attorneys incompetent. It was merely a wholesome rule of practice.

17. Law. Man. on Prof. Conduct (ABA/BNA) 61:503.

18. See, e.g., Note, The Advocate-Witness Rule: If Z, Then X, But Why? 52 N.Y.U. L. Rev. 1365, 1368 (1977) ("[N]ot until the 1800's did anyone question the propriety, standing alone, of an attorney's testifying

on behalf of his client.") [hereinafter Note, If Z, Then X].

19. Stones v. Byron, 4 Dowl. & L. 393, 394, 75 Rev. R. 881, 882 (Q.B. 1846).

20. Cobbett v. Hudson, 1 El & Bl. 11, 15, 118 Eng. Rep. 341, 342, (Q.B. 1852). This court did not like the idea of an advocate testifying, calling it "not only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will be generally injurious to those who attempt it."

21. The literature is sparse as to what other nations have an analogous rule. One source states that Roman law precluded attorney testimony in civil cases due to lack of credibility because of bias. It adds that Spanish law follows a similar rule. Comment, The Attorney as Both Advocate and Witness, 4 Creighton L. Rev. 128, 136-37 (1970) [hereinafter Comment, Attorney as Both]. Enker, The Rationale of the Rule That Forbids a Lawyer To Be Advocate and Witness in the Same Case, Am. B. Found. Res. J. 455, 456 n.7 (1977) (adds the English and Israeli systems to this list).

22. See Sutton, The Testifying Advocate, 41 Tex. L. Rev. 477, 478 n.7 (1963); Wydick, Trial Counsel as Witness: The Code and the Model Rules, 15 U.C. Davis L. Rev. 651, 653 (1982).

23. The Stones v. Byron creation of the jury confusion rationale illustrates that courts, even in the nascency

of the advocate-witness rule, felt pressed to identify rationales for excluding otherwise admissible evidence.

24. Universal Athletic Sales Co. v. American Gym, Recreational, & Athletic Equipment Corp., 546 F.2d 530, 539 (3rd Cir. 1976), ("Of course, such testimony may subject the attorney to separate disciplinary action."), cert. denied, 430 U.S. 984 (1977). See French v. Hall, 119 U.S. 152, 154 (1886) ("There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client." The court went on to say that the practice "may be unseemly" and "may very properly be discouraged" but then added "there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong.").

25. Sutton, supra note 22, at 478.

26. 6 J. Wigmore, supra note 15, at 775.

27. Id.

28. Note, If Z, Then X, supra note 18, at 1371 (It took over 50 years after Stones v. Byron for the American Bar Association to become "convinced of the incompatibility of the advocate and witness functions. . . .").

29. Wydick, supra note 22, at 653 n.4.

30. Canons of Professional Ethics Canon 19 (1957).

31. Note, Legal Ethics--Enforceability of Canon Prohibiting Attorney's Testimony on Behalf of Client, 33 N.C.L. Rev. 296, 298 (1955) [hereinafter Note, Legal Ethics].

32. Wydick, supra note 22, at 654.

33. Branom v. Smith Frozen Foods of Idaho, Inc., 83 Idaho 502, 512, 365 P.2d 958, 963-4 (1961) (Attorney testifying that a jar of seed peas, which was in his office for weeks before the trial, was in the same condition at trial as when it left his office is a formal matter).

34. See supra note 4 and accompanying text.

35. Wydick, supra note 22, at 656-57. The conflict in testifying against a client is between the duty to testify truthfully and loyalty to the client's interests.

36. Wydick, supra note 22, at 653.

37. Wydick, supra note 22, at 657.

38. In fact, as of 1945, in spite of Canon 19 having been in existence for 37 years, only 6 states "gave any substance to the proposition that an attorney should

not be both advocate and witness in the same cause." Comment, Attorney as Both, supra note 21, at 137.

39. Id. at 135.

40. Id. Most states allowed the prosecutor to call himself as a witness for the state, but the trend was to force withdrawal in this situation. This different treatment of prosecutors and defense counsel would continue, possibly for reasons discussed infra note 268 and accompanying text.

41. Id. at 133.

42. Wydick, supra note 22, at 657.

43. Model Code of Professional Responsibility, Preamble and Preliminary Statement (1970).

44. Note, If Z, Then X, supra note 18, at 1373.

45. Brown & Brown, Disqualification of the Testifying Advocate - A Firm Rule?, 57 N.C.L. Rev. 597, 598 (1979).

46. Model Code of Professional Responsibility, DR 5-101(B) (1976).

47. Model Code of Professional Responsibility, DR 5-101(B) (1976). Model Code of Professional Responsibility, EC's 5-9 and 5-10 also bear on the

advocate-witness rule in the Model Code. EC 5-9 provides:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If the lawyer is both counsel and witness he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the case of another, while that of a witness is to state the facts objectively.

EC 5-10 provides:

> Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony would relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In

> weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

48. Brown & Brown, supra note 45, at 600.

49. See supra note 43 and accompanying test.

50. Wydick, supra note 22, at 658 n.36.

51. Brown & Brown, supra note 45, at 601.

52. See infra notes 54-69 and accompanying text.

53. Id. at n.18.

54. See supra notes 46-47 and accompanying text; Wydick, supra note 22, at 666 (A split of authority exists as to its meaning.).

55. Wydick, supra note 22, at 666.

56. Id.

57. Id.

58. See, e.g., Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332, 1337 (Fed. Cir. 1988).

59. Sutton, supra note 22, at 489.

60. Id.

61. It adds little to the rule because any lawyer called to account for allegedly violating the advocate-witness rule would never allow himself to admit he "knew" he would testify.

62. See, e.g., United States v. Siegner, 498 F. Supp. 282, 285 (E.D. Pa. 1980) (This case concerned the court because the potential testimony by the attorney was against his client. Perhaps that potential conflict prompted the court to set a very low threshold for disqualification. "While it is not clear to us whether or not the [attorney] actually has such knowledge, the [opposing counsel] believes he does. . . .").

63. United States ex rel. Sheldon Electric Co., Inc. v. Blackhawk Heating & Plumbing Co., Inc., 423 F. Supp. 486, 488 (S.D.N.Y. 1976).

64. Kalmanovitz v. G. Heilman Brewing Co. 610 F. Supp. 1319, 1325 (D. Del. 1985), aff'd, 769 F.2d 152 (3rd Cir. 1985).

65. Law. Man. on Prof. Conduct (ABA/BNA) 61:507.

66. Sutton, supra note 22, at 602. Presumably this second lawyer did not fall within the purview of the provision disqualifying the attorney who "knows" he

will testify, or the Model Code would probably disqualify him whether he ought to testify or not.

67. Kalmanovitz, 610 F. Supp. at 1325.

68. Sutton, supra note 22, at 603.

69. Id.

70. See supra note 47.

71. See infra notes 244-248 and accompanying text.

72. Wydick, supra note 22, at 689 n.198.

73. Id. at n.199.

74. See, e.g., Model Rules of Professional Conduct, Rule 1.7 (1980).

75. See supra note 46 and accompanying text.

76. Wydick, supra note 22, at 670-71.

77. See infra notes 250-267 and accompanying text.

78. See infra notes 203-214 and accompanying text.

79. See infra notes 293-296 and accompanying text.

80. See infra notes 322-354 and accompanying text.

81. Wydick, supra note 22, at 671.

82. See infra notes 137-143 and accompanying text.

83. 27 M.J. 110 (C.M.A. 1988).

84. Id. at 116. The court, id. at n.6, said "This language might be read as focusing on the subject of the lawyer's fee; but it is not necessarily so limited."

85. Id.

86. Id.

87. Id.

88. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975) at 2 (ABA Formal Opinion 339 states, "Circumstances within exceptions (1) through (3) will usually be easily identifiable and should not present a difficult problem." Exception (3) is the "nature and value of legal services." Exceptions (1) and (2) deal with "uncontested" and "formal" matters, respectively. While exception (3) has generated little discussion in the advocate-witness rule literature, the first two exceptions provide a fertile ground for confusion. See Wydick, supra note 22, 274 at 669-70. ("There is scant authority to explain how [formality and uncontested] differ, if they do.") Therefore, this analysis addresses these two exceptions jointly.

89. Wydick, supra note 22, at 654.

90. Comment, Attorney as Both, supra note 21, at 142-43.

91. Disqualification of Counsel Under the Advocate-Witness Rule: Fair or Futile?, 48 U. Cin. L. Rev. 794, 804 (1979) [hereinafter Fair or Futile?].

92. Supreme Beef Processors, Inc. v. American Consumer Indus., Inc., 441 F. Supp. 1064, 1068 (N.D. Tex. 1977) (The contents of the lawyer's briefcase at the time his client alleged readiness to close a deal could have tended to prove that readiness).

93. Other than those items eligible for judicial notice. For an example of a judicial notice rule, see Mil. R. Evid. 201.

94. Brown & Brown, supra note 45, at 606.

95. Comment, Attorney as Both, supra note 21, at 143 ("[D]efining a purely formal matter as an uncontroverted subject provides a fairly workable solution.").

96. Sutton, supra note 22, at 491.

97. Id. at 492. See Wydick, supra note 22, at 670. ("[E]ither or both of the exceptions ought to allow the testimony unless there is reason to doubt its accuracy and credibility).

98. Comment, Attorney as Both, supra note 21, at 143.

99. Note, The Ethical Propriety of an Attorney's Testifying in Behalf of His Own Client, 38 Iowa L. Rev. 139, 144 (1952) [hereinafter Note, Ethical Propriety].

100. Sutton, supra note 22, at 492.

101. Comment, The Rule Prohibiting an Attorney from Testifying at a Client's Trial: An Ethical Paradox, 45 U. Cin. L. Rev. 268, 272 (1976) [hereinafter Comment, An Ethical Paradox].

102. Id.

103. See supra note 47 and accompanying text.

104. See supra note 47.

105. Brown & Brown, supra note 45, at 608.

106. See, e.g., Brown & Brown, supra note 45, at 608 ("[W]hatever benefit there is in strict enforcement of the rule may be undermined by the continued involvement of a disqualified [attorney] in the affairs of the client.").

107. 27 M.J. 110, 114 (C.M.A. 1988) "Unfortunately here, the military judge's disqualification of [the defense counsel] and his ban of [that counsel] from the courtroom -- rather than promoting justice at trial -- deprived [the defendant] of a most cherished right to

the continued representation of his lawyer of 5 months." Id. at 115-16.

108. Id. at 115.

109. United States v. Cunningham, 672 F.2d 1064, 1070 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984).

110. Id. at 1074.

111. See infra notes 237-239 and accompanying text.

112. But see, infra notes 127-128 and accompanying text.

113. See Culebras Enterprises Corp. v. Rivera-Rios, 846 F.2d 94, 98 (1st Cir. 1988) (The Model Rules are "less restrictive" since Rule 3.7 speaks in terms of the "advocate at trial.").

114. Wydick, supra note 22, at 659.

115. United States v. Hanson, 24 M.J. 377, 379 (C.M.A. 1987).

116. United States v. Hanson, 24 M.J. 377, 379-80 (C.M.A. 1987).

117. Id.

118. Fed. R. Evid. 403 states: "Although relevant, evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 22 C. Wright & K. Graham, Federal Practice and Procedure Rule 403 (1977).

119. See supra note 47 and accompanying text.

120. Brown & Brown, supra note 45, at 602 n.24.

121. Id.

122. Unites States v. Treadway, 445 F. Supp. 959, 960-61 (N.D. Tex. 1978), cert. denied, 444 U.S. 1032 (1980).

123. MacArthur v. Bank of New York, 524 F. Supp. 1205, 1211 n.3 (S.D.N.Y. 1981) (A federal district court did not require disqualification before proceeding with a summary judgment motion because no witnesses were a part of such motion).

124. See infra notes 199-355 and accompanying text.

125. Fair or Futile?, supra note 91, at 805.

126. Note, If Z, Then X, supra note 18, at 1375 (The "most widespread . . . literalist approach . . . demands an exceedingly high, probably impossible, and certainly inordinate showing of hardship before an exception can be triggered . . . and often produces

unfair results."). See Fair or Futile?, supra note 91, at 807 ("Also, the courts have narrowly construed the 'substantial hardship' exception, causing the rule to be applied to situations in which its purposes are defeated."); Cramer, Policing Conflicts of Interest, 1980 Ann. Surv. Am. L. 823, 825 (1980) ("[T]he trend is to interpret the exception narrowly. . . .").

127. This approach is analogous to the issue of the appropriate timing and meaning of withdrawal. See supra notes 111-114 and accompanying text.

128. Id. at 1377-78.

129. Brown & Brown, supra note 45, at 606 ("Since the client cannot by choice or waiver avoid the imposition of the rule, [this exception] is the only aspect of the rule that runs directly in the client's favor.").

130. Law. Man. on Prof. Conduct (ABA/BNA) 61:517.

131. In re Conduct of Lathen, 294 Or. 157, 165, 654 P.2d 1110, 1114 (1982).

132. Id.

133. Note, If Z, then X, supra note 18, at 1375 (Id. at 1379-84 discusses 4 cases with a "client-oriented interpretation of the rule," id. at 1379 ("Of course, none of the decisions held the [advocate-witness] rule inapplicable, but each of the courts evidenced sympathy for the client's position in the advocate-witness

situation and employed the substantial hardship exception to safeguard it." Id. at 1383).

134. United States v. Baca, 27 M.J. 110 (C.M.A. 1988).

135. 27 M.J. at 119.

136. See Note, If Z, Then X, supra note 18, at 1384. (In discussing the 4 cases mentioned supra note 133, "Most interestingly, the courts seemed to shift the presumption against the testifying advocate . . . so that the burden would rest with the adversary claiming prejudice.")

137. MacArthur v. Bank of New York, 524 F. Supp. 1205, 1210 (S.D.N.Y. 1981). See Jones v. City of Chicago, 610 F. Supp. 350, 361 (N.D. Ill. 1984), ("[A] lawyer's long standing relationship with a client, involvement with the litigation from the inception, or financial hardship to the client are [not] sufficient reasons to invoke the 'substantial' hardship exception to the advocate-witness rule.") rev'd on other grounds, 856 F.2d 985 (7th Cir. 1988); Kalmanovitz v. G. Heilman Brewing Co., 610 F. Supp. 1319, 1327 (D.Del. 1985) (The mere fact that an attorney has spent great time and resources does not equal substantial hardship, nor does the delay associated with obtaining a new attorney), aff'd, 769 F.2d 152 (3rd Cir. 1985); Teleprompter of Erie, Inc. v. City of Erie, 573 F. Supp. 963, 966 (W.D. Pa. 1983) (Delay to accommodate a new attorney is not substantial hardship).

138. Id.

139. 309 U.S. 323, 325 (1940). This case was not discussing the advocate-witness rule.

140. 423 F. Supp. 486 (S.D.N.Y. 1976).

141. Id. at 490.

142. Id.

143. Id., quoting Emle Indus., Inc. v. Pantatex, Inc., 478 F.2d 562, 574 (2d Cir. 1973).

144. Sutton, supra note 22, at 494 n.61. In a non-contingent fee case, the money spent on the first lawyer could exhaust the client's ability to retain a second quality counsel. No court has yet addressed this issue.

145. See supra note 46 and accompanying text.

146. United States v. Peng, 602 F. Supp. 298, 304 (S.D.N.Y. 1985) ("That [the attorney] has prepared extensively for trial does not make his services distinctly valuable within the meaning of [the] rule."), aff'd, United States v. Kwang Fu Peng 766 F.2d 82 (2d Cir. 1985). See Jones v. City of Chicago, 610 F. Supp. 350, 361 (N.D. Ill. 1984) (A lawyer and his client cannot increase their relationship hoping to rise to the level of substantial hardship where they knew in advance of the advocate-witness issue), rev'd

on other grounds, 856 F. 2d 985 (7th Cir. 1988); Brown & Brown, supra note 45, at 607.

147. Brown & Brown, supra note 45, at 607.

148. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339, at 3 (1975)

> [W]here a complex suit has been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential. . . . Similarly, a long or extensive professional relationship with a client may have afforded a lawyer, or a firm, such an extraordinary familiarity with the client's affairs that the value to the client of representation by that lawyer or firm in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer, or a lawyer in the firm, testify to some disputed and significant issue. . . . a lawyer having knowledge of misconduct of a juror during the trial of a case is not required to withdraw as counsel in the proceedings. . . .

See MacArthur v. Bank of New York, 524 F. Supp. 1205, 1210-11 (S.D.N.Y. 1981) (An attorney with a high degree of technical expertise developed for this technical case or a long standing relationship providing extraordinary and irreplaceable familiarity with the client's affairs could rise to the level of distinctive value.); Jones v. City of Chicago, 610 F. Supp. at 361 (The substantial hardship argument is weaker where the attorney and client knew in advance of the issue); Wydick, supra note 22, at 671 (An example of distinctive value includes the case in which an attorney has "developed an encyclopedic knowledge of the facts and legal theories relevant to the case" over

an extended period of time, and only learns "shortly before trial" that he must be a witness.)

149. See supra note 47.

150. Law. Man. on Prof. Conduct (ABA/BNA) 61:503.

151. Wydick, supra note 22, at 672.

152. MacArthur v. Bank of New York, 524 F. Supp. 1205, 1211 (S.D.N.Y. 1981) ("[A]n attempt to have an opposing counsel disqualified is most likely to occur when that counsel is for some reason irreplaceable.").

153. Id.

154. United States v. Baca, 27 M.J. 110, 119 (C.M.A. 1988).

155. Wydick, supra note 22, at 673. Tactical applications of the advocate-witness rule are considered in greater depth supra notes 396-429 and accompanying text.

156. See infra notes 164-181 and accompanying text.

157. Model Rules of Professional Conduct, Preface at x.

158. Model Rules of Professional Conduct, (1984).

159. Id. Rule 3.7.

Rule 1.7 provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonable believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. . . .

Rule 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit with respect to a client or when the information has become generally known.

Finally, Rule 1.10 provides:

> (a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, . . ., 1.9. . . .
>
> . . . .
>
> (d) A disqualification prescribed by this

rule may be waived by the affected client under the conditions stated in Rule 1.7.

160. Id. Rule 3.7 Comment, at 75.

161. See supra notes 199-355 and accompanying text for the reasons for the rule before the Model Rules.

162. Model Rules of Professional Conduct, Rule 3.7 Comment, 74. See Law. Man. of Prof. Conduct (ABA/BNA) 61:502 ("Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and the client.").

163. Id.

164. Wydick, supra note 22, at 677.

165. Model Rules of Professional Conduct, Rule 3.7, Comment, 75. See Wydick, supra note 22, at 700 ("[N]o skilled advocate can accurately predict the extent to which the trier-of-fact may be influenced by a piece of damaging evidence extracted from a client's own counsel"); ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 339 (1975), at 4.

166. Model Rules of Professional Conduct, Rule 1.7, Comment, at 33.

167. Wydick, supra note 22, at 678.

168. Model Rules of Professional Conduct, Rule 1.7(a)(2) and (b)(2).

169. Client consent only applies to the conflict of interest provisions. Rule 3.7 itself contains no consent provision. See Wydick, supra note 22, at 677 (Professor Wydick states that this lack of a consent provision in Rule 3.7 is "because [the authors of the rule] want to protect not just the client (Model Rule 1.7), but also the adversary and the integrity of the legal profession (Model Rule 3.7)). See also Law. Man. on Prof. Conduct (ABA/BNA) 61:508 ("but Model Rule 3.7's more liberal "substantial hardship" exception obviates the need for waiver").

170. Law. Man. on Prof. Conduct (ABA/BNA) 61:501. See Wydick, supra note 22, at 678.

171. Model Rules of Professional Conduct, Rule 3.7, Comment, at 74.

172. Id.

173. Id.

174. Id. See Wydick, supra note 22, at 693. (To this list of factors offered in the Rule 3.7 Comment, Professor Wydick would add "Who is the trier-of-fact?" on the theory that a judge is far less likely to be confused than a jury). This suggestion is a good one. Judge alone issues are discussed at greater length supra notes 451-457 and accompanying text. Professor

Wydick also suggests close cases should allow the attorney to remain on the case, because of certain harm if you disqualify him, versus only possible harm if he remains the trial counsel. For example, he may not testify, or the case may never get to trial. This suggestion, too, is a good one. Id. at 694.

175. The standard a lawyer should use in assessing potential conflicts appears in the Model Rules of Professional Conduct, Rule 1.7 comment, at 30. Interestingly, the following language was in the Model Rules of Professional Conduct, Rule 1.7 Proposed Final Draft Rule 1.7 comment, at 48-49, quoted in Wydick, supra note 22, at 681 n.150: "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement, or provide representation on the basis of the client's consent." The absence of such language in the August 1984 Rule 1.7 comment may signal an intent to make it easier for the lawyer to escape conflict and rely on client consent, since most neutral lawyers would opt for the safe approach when it was not their case or their client's money.

176. Wydick, supra note 22, at 685.

177. See infra notes 199-355 and accompanying text for the discussion of the traditional bases for the advocate-witness rule.

178. See supra note 159.

179. See Baker v. Leahy, 633 F. Supp. 763, 765, n.1 (E.D. Pa. 1985); In Re American Cable Publications, Inc. 768 F.2d 1194, 1196 (10th Cir. 1985).

180. Id. at 75. See Law. Man. on Prof. Conduct (ABA/BNA) 61:501.

181. Wydick, supra note 22 at 701.

182. See, e.g., Canon Airways v. Franklin Holdings Corp., 669 F. Supp. 96, 100 (D. Del. 1987); Law. Man. on Prof. Conduct (ABA/BNA) 61:507; .

183. Law. Man. on Prof. Conduct (ABA/BNA) 61:507.

184. Wydick, supra note 22, at 684-85. The hypothetical makes the point that the less necessary the attorney is as a witness, the more open he is to having his testimony suppressed through a Fed. R. Evid. 403 motion. The probative value is small, or he would be necessary, but the prejudicial value allegedly associated with an advocate also testifying still remains.

185. Id.

186. Wydick, supra note 22, at 678.

187. Id. at n.138.

188. Dalrymple v. Nat'l. Bank & Trust Co. of Traverse City, 615 F. Supp. 979, 989 (D.C. Mich. 1985).

189. Wydick, supra note 22, at 702.

190. United States v. Baca, 27 M.J. 110, 116 n.5 (C.M.A. 1988).

191. Id. at 118.

192. The Court of Military Appeals' aggressive interpretation of the advocate-witness rule and reading of the Model Code provisions concerning the advocate-witness rule generated the same result, not a similarity between the two codifications.

193. Jones v. City of Chicago, 610 F. Supp. 350, 356 (N.D. Ill. 1984), rev'd on other grounds, 856 F.2d 985 (7th Cir. 1988).

194. See supra note 194, 232 and accompanying text.

195. Jones v. City of Chicago, 610 F. Supp. at 361.

196. Duncan v. Poythress, 750 F.2d 1540, 1546 (11th Cir. 1985), vacated, 756 F.2d 1481 (1985). The Court of Appeals for the Eleventh Circuit rendered essentially the same decision as the vacated opinion, en banc, in Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475 U.S. 1129 (1986).

197. Id.

198. In Re American Cable Publications, Inc., 768 F.2d 1194, 1196 (10th Cir. 1985).

199. See supra note 19 and accompanying text.

200. See supra notes 28-41 and accompanying text.

201. See supra note 41 and accompanying text.

202. See supra notes 54-156 and accompanying text.

203. ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 339 (1975), at 2.

204. Fontaine v. Patterson, 305 F.2d 124, 130 (5th Cir. 1962).

205. See Note, The Ethical Propriety, supra note 99, at 140 (discussing a decision which said no credence could be given such testimony unless there was most satisfactory corroboration and also identifies a case allowing a jury instruction that the jury may consider that the attorney testified for his client); Comment, Attorney as Both, supra note 21, at 133, (cites case in which the attorney's evidence was uncontradicted, yet the court totally ignored it because "the interest of the attorney destroyed the credibility of his testimony."); Id. at 142 ("[T]he testimony is subject to criticism if not suspicion, and the courts have carefully scrutinized the testimony. . . . [O]nly the most compelling corroborative evidence allows the jury to give any weight to such testimony."); Sutton, supra note 22, at 482 (a lawyer witness should not allow himself to become a less effective witness by being an advocate in the case).

206. Comment, Attorney as Both, supra note 21, at 133. See if this case was judge alone.

207. See ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 339 (1975), (The client is entitled to an advocate whose effectiveness cannot be impaired because of his advocate having been a witness); Law. Man. on Prof. Conduct (ABA/BNA) 61:504 (diminished credibility as a witness may spill over to affect adversely his persuasiveness as an advocate for his client); Note, Fair or Futile?, supra note 91, at 797 (diminished witness credibility may hamper his courtroom advocacy efforts, depriving the client of both a credible witness and an effective advocate); Note, If Z, Then X, supra note 18, at 1398 (concludes that "The only viable rationale for prohibiting trial counsel from taking the stand is the prospect that his credibility as both witness and advocate will suffer in the eyes of the jury to the ultimate detriment of the client." This note goes on to advocate an informed client waiver of this danger).

208. The prevalent objection to the harm to the client rationale is that the client should be able to waive such harm, but the Model Code does not allow for such consent. See Sutton, supra note 22, at 484 (Rejection of employment entirely "will leave the attorney as a disinterested witness for the litigant.").

209. The issue of what constitutes withdrawal is addressed infra notes 103-118, and accompanying text. Withdrawal has been interpreted many ways: from the

case completely, from the trial, and from the role of addressing the trier-of-fact, for example.

210. Note, If Z, Then X, supra note 18, at 1395. See Wydick, supra note 22, at 660. (The attorney may be an ineffective witness because obviously partisan; but withdrawal may not make him disinterested).

211. Brown & Brown, supra note 45, at 611.

212. Note, If X, Then Z, supra note 18, at 1395. See Sutton, supra note 22, at 480 (The possibility of perjury or tailor-made evidence is a restatement of the "long discarded reason once used to justify disqualification of an interested party.").

213. Enker, supra note 21, at 457. See Brown & Brown, supra note 45, at 610-11 ("[I]mpeachability for interest is not likely to evaporate with . . . withdrawal from the case.")

214. See infra notes 255-267 and accompanying text.

215. Note, If Z, Then X, supra note 18, at 1394.

216. Violating the advocate-witness prohibition seemingly hurts the opponent as well as the client. See infra notes 250-? and accompanying text.

217. United States v. Baca, 27 M.J. 110, 118 (C.M.A. 1988).

218. The Baca advocate testimony was before the judge on a pretrial competency issue. No language in the case indicates a need for a different result if the testimony occurred before a lay trier-of-fact. Though that case would be harder, the result should be the same. Mere interest in the case should not bar the sole bearer of relevant evidence from his witness duty to impart his knowledge of that evidence to the trier-of-fact, even if that interest originates in his role as client's counsel.

219. Baca, 27 M.J. at 114. See Comment, Attorney as Both, supra note 21, at 144 (Under the influence of professional zeal, attorneys become, in feeling, completely identified with those who employ them. This source cites this reason as one for the advocate-witness rule).

220. Id.

221. United States v. Siegner, 498 F. Supp. 282, 285 (E.D. Pa. 1980) ("[I]ndependent professional judgment may be clouded. . . . Disqualification will therefore better serve [the client's] interests and the interests of justice by removing any conflict." The court in this case was uneasy because the government counsel was asserting that the defense lawyer would ultimately testify against his client). See Note, If Z, Then X, supra note 18, at 1396 ("When a lawyer is so personally involved in the events which form the action, that he has vital testimony to offer. . . . [S]uch lawyer's judgment is likely to be affected").

222. Siegner, 498 F. Supp. at 285 (It is "entirely possible that a different defense counsel might to wish to call [the advocate] to testify" on the client's behalf); See Supreme Beef Processors v. American Consumer Industries, Inc., 441 F. Supp. 1064, 1068 (N.D. Tex. 1977) (The court acts as the neutral advocate to tell the attorney he should testify to corroborate the client's story, because the client is entitled to "every scrap of favorable evidence that is available not only the favorable evidence that is essential to his case"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975) at 2 (states the obvious: "[G]iven a choice between two or more witnesses competent to testify as to contested issues, and other factors being equal, a client's cause is best served by having the testimony from the witness not subject to impeachment in the outcome of the trial); Law. Man. on Prof. Conduct (ABA/BNA), 61:509 (explains why the courts must take this paternalistic approach: "A party can be represented by other attorneys, but cannot obtain substitute testimony for a counsel's relevant personal knowledge").

223. Id. at 115.

224. Id.

225. Note, If Z, Then X, supra note 18, at 1400.

226. Sutton, supra note 22, at 496.

227. 6 J. Wigmore, supra note 15, at 788 (Dean Wigmore made this statement while discussing appellate courts ordering a new trial when a counsel breached professional ethics by being an advocate and witness in the same case); See Note, Legal Ethics -- Enforceability of Canon Prohibiting Attorney's Testimony on Behalf of Client, 33 N.C.L. Rev. 296, 299 (1955) [hereinafter Note, Legal Ethics].

228. Jones v. City of Chicago, 610 F.Supp. 350, 357 (N.D. Ill. 1984) (This court was applying Model Rule of Professional Conduct, Rule 3.7, discussed supra notes 157-198 and accompanying text), rev'd on other grounds, 856 F.2d 985 (7th Cir. 1988).

229. Such harm is at least denying the client his first choice of counsel.

230. The drafters of the Model Rules of Professional Conduct, Rule 3.7 comment (which replaced the Model Code in 1983 and is discussed supra notes 157-198 and accompanying text) rejected this harsh approach, recognizing "that a balancing is required between the interests of the client and those of the opposing party".

231. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975), at 4-5.

232. MacArthur v. Bank of New York, 524 F. Supp. 1205, 1209 (S.D.N.Y. 1981) (The court in this case recognized that the opposing party's late disqualification motion

had tactical overtones (such tactical uses of the advocate-witness rule are discussed infra notes 396-429 and accompanying text) but concluded that "such abuse by opposing counsel does not cure the original violation and cannot vitiate the disciplinary rule" Id. at 1210). See also United States v. Maloney, 241 F. Supp. 49, 51 (W.D. Pa. 1965) (The United States government will not automatically receive a continuance to procure replacement counsel if the United States attorney must withdraw and testify, because the defendant's pretrial motion to disqualify him has given him ample advanced warning of the issue).

233. The court in United States v. Siegner, 498 F. Supp. 282, 287 (E.D. Pa. 1980) would disagree as to whether this is better for the client because a failure to withdraw being challenged as ineffective

> "would remain forever open . . . [causing] a climate of uncertainty unfair to the government, and most importantly, to the defendant. . . . [T]he confidence of the people in the criminal justice system is not enhanced by such doubts . . . [and] raises the specter of deliberate abuse by defendants and their attorneys, who may seek to avoid disqualification in . . . the hope of later seeking reversal of a conviction or withdrawal of a guilty plea."

234. International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975).

235. Note, If Z, Then X, supra note 18, at 1367. See Fair or Futile?, supra note 91, at 807 (The "rule effectively penalizes individuals for having foresight

to consult an attorney on a legal problem in advance.").

236. Brown & Brown, supra note 45, at 614, n.82. See Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1352 (D. Colo. 1976):

> One reason for maintaining a continuing relationship with a lawyer or law firm is to prevent the difficulty which would ensue if each time litigation was commenced a new attorney would be required to familiarize himself with the client and its business. . . . A client who desires to head off a court battle should not be penalized for having the foresight to employ legal counsel before the commencement of a lawsuit;

Brown & Brown, supra note 45, at 621 (The only way employing the advocate-witness rule may resolve litigation is by closing the court house door to the client. If he continues to pursue his claim, both he and the judicial system incur costs and delays associated with finding a new lawyer).

237. Brown & Brown, supra note 45, at 807. See Optyl Eyewear Fashion Int'l. v. Style Companies , 760 F.2d 1045, 1050 (9th Cir. 1985) (costs of disqualification could be high).

238. Jones v. City of Chicago, 610 F. Supp. 350, 361 n.6 (N.D. Ill. 1984), rev'd on other grounds, 856 F. 2d 985 (7th Cir. 1988).

239. Brown & Brown, supra note 45, at 614.

240. 28 U.S.C. § 1654 (1982).

241. Duncan v. Poythress, 750 F.2d 1540, 1541 (11th Cir. 1985) vacated, 756 F.2d 1481 (1985). The Court of Appeals for the Eleventh Circuit rendered essentially the same decision as the vacated opinion, en banc, in Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475, U.S. 1129 (1986).

242. Brown & Brown, supra note 410, at 615.

243. International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975).

244. See, e.g., Mil. R. Evid. 502.

245. ABA Comm. on Ethics and Professional Responsibility, Formal Op.339 (1975), at 4.

246. Wydick, supra note 22, at 700.

247. See supra note 118.

248. Wydick, supra note 22, at 688 n.189.

249. Comment, An Ethical Paradox, supra note 101, at 270.

250. International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975) (puts the opponent in the awkward position of cross-examining a fellow lawyer). See In Re American Cable Publications, Inc. 768 F.2d 1194, 1196 ( 10th Cir. 1985) (uneasy situation arises when opposing counsel must impeach on cross-

examination another lawyer-adversary); Cramer, supra note 126, at 824 (opposing counsel may have difficulty challenging the credibility of a witness who also appears as an advocate in the case); Comment, An Ethical Paradox, supra note 101, at 271 (the opposing counsel will be in the embarrassing predicament of attacking the credibility of a professional colleague); Note, If Z, Then X, supra note 18, at 1370-71 (fear that professional courtesy will inhibit opposing counsel from effectively cross-examining his opponent); Enker, supra note 21, at 457 (some lingering fear that opposing counsel's sense of professional fraternity will overcome his partisan duty to his client).

251. Jones v. City of Chicago, 610 F. Supp. 350, 362 (N.D. Ill. 1984) ("Embitterment between counsel, also detrimental to the process, is likely to occur when one counsel seeks to impeach the credibility of opposing counsel. . . . [O]ne cannot imagine two more bitter foes [than those before the court]"), rev'd on other grounds, 856 F. 2d 985 (7th Cir. 1988).

252. See e.g., Optyl Eyewear Fashion Int'l. v. Style Companies, 760 F.2d 1045, 1049-50 (9th Cir. 1985) (In this case, the opposing party actually claimed such prejudice. The court said the advocate did not want to testify in the first place; his prospective testimony is only an issue because of a motion to disqualify made by opposing counsel. Furthermore, opposing counsel has an ethical duty stronger than professional loyalty to a fellow attorney); Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title ins. Co. 421 F. Supp. 1348, 1354

(D. Colo. 1976) (lawyer's duty to represent a client competently and zealously would easily overcome any inhibiting effects of professional loyalty); Law. man. on Prof. Conduct (ABA/BNA) 61:505; Enker, supra note 21, at 458 (an ethical dilemma for the opposing counsel rather than for the attorney who testifies).

253. Brown & Brown, supra note 45, at 612. See Optyl Eyewear, 760 F.2d at p. 1050 (impeaching opposing counsel awkward whether he is disqualified or not); Comment, An Ethical Paradox, supra note 101, at 271 (an attorney who withdraws from participation as trial counsel retains his professional status); Note, If Z, Then X, supra note 18, at 1388; Wydick, supra note 22, at 662 (the advocate-witness rule does not solve the problem because the testifying attorney remains a colleague at the bar).

254. See, e.g., Mil. R. Evid. 611.

255. In Re American Cable Publications, Inc. 768 F.2d 1194, 1196 (10th Cir. 1985) ("The [advocate-witness] rules prevent situations in which others might think the lawyer, as, witness, is . . . enhancing his own credibility as an advocate by virtue of having taken an oath as a witness"); Fair or Futile?, supra note 91, at 798 (jury or judge might place too much weight on the testifying lawyer's closing arguments); Note, If Z, Then X, supra note 18, at 1370 (converse of the impeachment by interest rationale, the opposing party will suffer because of testimonial weight placed on the lawyer's closing arguments); Comment, Attorney as Both,

supra note 21, at 144 ( danger that jury will give undue testimonial weight to the attorney's argument).

256. In Re American Cable Productions, 768 F.2d at 1196.

257. Wydick, supra note 22, at 663.

258. Law. Man. on Prof. Conduct (ABA/BNA) 61:505.

259. Jones v. City of Chicago, 610 F. Supp. 350, 357 (N.D. Ill. 1984), rev'd. on other grounds, 856 F.2d 985 (7th Cir. 1988).

260. Levin & Levy, Persuading the Jury With Facts Not in Evidence: The Fiction-Science Spectrum, 105 U. Pa. L. Rev. 139, 157 (1956). (The authors cite an apparent paradox of allowing Bible stories, literature, and hypothetical tales in closing argument, but not a true personal anecdote. They offer as a possible reason that allowing such anecdotes might give improper advantage to the older and better known lawyer. Id. at 154).

261. 6 J. Wigmore, supra note 15 at 780.

262. Note, If X, Then Z, supra note 18, at 1387. See Sutton, supra note 22, at 480 ("The appearance of a particular lawyer as either a witness or an advocate does not in itself . . . make his advocacy more appealing. . . . [I]t is difficult to see how the fact

he simultaneously appears as both could increase his influence on the trier-of-fact").

263. Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Co. 421 F. Supp. 1348, 1354 (D. Colo. 1976). See If Z, Then X, supra note 18, at 1387. But see Fair or Futile?, supra note 91, at 798 (judge might place too much weight on the testifying lawyer's closing arguments).

264. Wydick, supra note 22, at 663.

265. See Wydick, supra note 22, at 663 concerning this conflict with the ineffective witness rationale.

266. Enker, The Rationale of the Rule That Forbids a Lawyer To Be Advocate and Witness in the Same Case, Am. B. Found. Res. J. 455, 460-61 (1977).

267. Levin & Levy, supra note 260, at 157.

268. Robinson v. United States, 32 F.2d 505, 510 (8th Cir. 1928). In this case the court found that other prosecutors were available and familiar with the case, and so directed the withdrawal.

269. Levin & Levy, supra note 260, at 156. This author goes on to state that the risk is greatest when the prosecutor compares the evidence in the case at hand with evidence in other cases. But see Baker v. Leahy, 633 F. Supp. 763, 765 (E.D. Pa. 1985) ("[W]itness who is a government attorney does not have

a financial outcome of litigation. . . . This lack of financial interest justifies a narrow construction of the rule in cases where no prejudice is shown." In this case, a member of the government attorney's office sought to testify, so the court did not address the prosecutor issue per se.)

270. 119 U.S. 152, 154 (1886).

271. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975) at 2 (unseemly position of arguing his own credibility); Sutton, The Testifying Advocate, 41 Tex. L. Rev. 477, 481 (1963) ("Ultimately, the testifying advocate occupies the dubious and embarrassing position of trying to argue convincingly to the jury the strength and impartiality of his own testimony."); Fair or Futile?, supra note 91, at 798 (rule prevents the attorney from being placed in the difficult position of arguing the strength and impartiality of his own testimony); Cramer, supra note 126, at 824 (an advocate who argues his own credibility is at a disadvantage); Comment, The Attorney as Both Advocate and Witness, 4 Creighton L. Rev. 128, 144 (1970) [hereinafter Comment, Attorney as Both](unseemly for the attorney to place himself in a position to address the court or the jury on the question of what degree of credibility should be given to his own sworn testimony).

272. Enker, supra note 266, at 458.

273. Comment, The Rule Prohibiting an Attorney from Testifying at a Client's Trial: An Ethical Paradox, 45 U. Cin. L. Rev. 268, 271 (1976) [hereinafter Comment, An Ethical Paradox].

274. Wydick, Trial Counsel as Witness: The Code and the Model Rules, 15 U.C. Davis L. Rev. 651, 661 (1982).

275. Sutton, supra note 266, at 481.

276. Note, The Ethical Propriety of an Attorney's Testifying in Behalf of His Own Client, 38 Iowa L. Rev. 139, 141-42 (1952) (identifies Wisconsin as relying on this rationale at least in part for the advocate-witness rule).

277. Inglett & Co. v. Everglades Fertilizer Co. 255 F.2d 342, 349 (5th Cir. 1958).

278. United States v. Baca, 27 M.J. 110, 113 (C.M.A. 1988).

279. Id. at 115. The Court of Military Appeals rejected summarily a possibility that a counsel could be disqualified for emotional involvement in the case, saying, "Defense counsel are not fungible items." Id. 119.

280. MacArthur v. Bank of New York 524 F. Supp. 1205, 1209 (S.D.N.Y. 1981).

281. Note, The Advocate-Witness Rule: If Z, Then X, But Why? 52 N.Y.U. L. Rev. 1365, 1371 (1977) [hereinafter Note, If Z, Then X].

282. Id. See Id. at 1389 n.142, citing Woody Allen's Bananas as a "humorous depiction" of this mechanical problem.

283. For example, he could have his questions written and numbered. He then could read the question number, the question, then turn to the trier of fact, and deliver his response. He should have no problem with surprise answers, nor should he have to ask himself any questions resembling a forceful cross-examination. Using an assistant counsel for the direct and redirect questioning would alleviate all mechanical problems.

284. Brown & Brown, Disqualification of the Testifying Advocate - A Firm Rule?, 57 N.C.L. Rev. 597, 610 (1979).

285. Id.

286. Jones v. City of Chicago, 610 F. Supp. 350, 357 (N.D. Ill. 1984), rev'd on other grounds, 856 F.2d 985 (7th Cir. 1988). See Note, Ethical Propriety, supra note 276, at 142.

287. See supra notes 255-267 and accompanying text.

288. See supra notes 203-218 and accompanying text.

289. See Note, If Z, Then X, supra note 281, at 1394 (It is unclear whether the underlying concern is for the trier-of-fact or the attorney and his client.) But see Law. Man. on Prof. Conduct (ABA/BNA) 61:502 (Concern for jury confusion appears as one of the concerns voiced in Model Rules of Professional Conduct, Rule 3.7 comment).

290. Note, If Z, Then X, supra note 281, at 1389.

291. The closing lines of the confrontation between the two protagonists in the mid-1980's Paramount Picture Rustler's Rhapsody.

292. Character's statement upon meeting his old flame, an Israeli intelligence operative, in a made-for-TV movie adaptation of David Morrell, The Brotherhood of the Rose. This negative statement does not appear in the corresponding scene in the novel, at 112-13.

293. See, e.g., Cerniak, The Lawyer as a Witness for His Client, 17 Ala. L. Rev. 308, 309 (1965) (violates public policy); Fair or Futile?, supra note 91, at 796 (primary rationale for the rule is to avoid the perception of impropriety); Note, Ethical Propriety, supra note 276, at 146 (preventing the dual role is an excellent place to begin repairing the public's protection of the legal profession); Cramer, supra note 126, at 824 (most important, a lawyer must avoid even the appearance of impropriety); 6 J. Wigmore, supra note 15, at 776 (the most potent and most common reason judicially advanced); Law. Man. on Prof. Conduct

(ABA/BNA) 61:504 (the public will suspect the advocate of distorting the truth to further his client's interests); Note, If Z, Then X, supra note 281, at 1367 (primarily intended to protect the legal profession from the appearance of impropriety); Comment, Attorney as Both, supra note 266, at 145 (most persuasive argument, respect for the profession and confidence in it will be effectively diminished).

294. Ferraro v. Taylor, 197 Minn. 5, 12, 265 N.W. 829, 833 (1936).

295. United States v. Crockett, 506 F.2d 759, 761 (5th Cir. 1975), cert. denied, 423 U.S. 824 (1975). See Sutton, supra note 266, at 482 ("The fear that the public will think lawyers will distort the truth in favor of the client, rather than any fear that lawyers do distort the truth. . . .").

296. Christensen v. United States, 90 F.2d 152, 155 (7th Cir. 1937). See Walsh v. Murphy, 2 Greene 227, 229 (Iowa 1849):

> [N]o respectable member of the profession, who properly appreciates his position in society, and at the bar, will so far forget the dignity of his profession, and his relation ot the court, as to become the willing and pliant tool in the hands of his client in the capacity of witness.

297. International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975) (The court disputes Dean Wigmore's contention that the public would think less

of lawyers than other witnesses merely because of their status).

298. Id. at 1294-95. See Comment, An Ethical Paradox, supra note 273, at 271 (view of the most cynical should not dictate the bounds of ethical conduct).

299. Enker, supra note 266, at 459.

300. Id.

301. Brown & Brown, supra note 284, at 613.

302. See supra note 47; ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975).

303. Sutton, supra note 266 at 482.

304. Disqualification of Counsel Under the Advocate-Witness Rule: Fair or Futile?, 48 U. Cin. L. Rev. 794, 807 (1979) [hereinafter Fair or Futile?].

305. Note, If Z, Then X, supra note 281, at 1391.

306. Fred Weber, Inc. v. Shell Oil Co. 566 F.2d 602, 609 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978).

307. Brown & Brown, supra note 284, at 613.

308. Wydick, supra note 126, at 665.

309. Brown & Brown, supra note 284, at 615.

310. Note, If Z, Then X, supra note 281, at 1390.

311. Id.

312. Wydick, supra note 22, 274, at 665 (Professor Wydick uses a colorful metaphor to make his point. "Do not bend over in your neighbor's canteloupe patch, even to tie your shoe.") Examples of other rules that might apply would be privilege rules.

313. Note, If Z, Then X, supra note 281, at 1390.

314. See infra notes 396-429 and accompanying text.

315. Sutton, supra note 266, at 497. See Id. at 486 The author uses United States v. Clancy, 276 F.2d 617 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961) as an example to illustrate his point. In that case, the defense lawyer wanted to testify as to juror misconduct in support of a motion for new trial. The court refused to allow this testimony and denied the motion).

316. Comment, An Ethical Paradox, supra note 273, at 273.

317. Id.

318. Optyl Eyewear Fashion Int'l. v. Style Companies, 760 F.2d 1045, 1049, quoting In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,

658, F.2d 1355,1360 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982).

319. Note, If Z, Then X, supra note 281, at 1393. The high cost of the advocate witness rule to the client is addressed in detail supra notes 225-239 and accompanying text.

320. Comment, Attorney as Both, supra note 266, at 135.

321. Comment, Ethical Paradox, supra note 273, at 273. Even some authors who support the rule recognize that the rule will be unfair in some situations. See, e.g., Fair or Futile?, supra note 304, at 808.

322. Inglett & Co. v. Everglades Fertilizer Co., 255 F.2d 342, 350 (5th Cir. 1958). See Law. Man. on Prof. Conduct (ABA/BNA) 61:505-06

> "[O]rdinary procedural safeguards designed to give the parties a full and fair hearing become problematic. For example, the familiar mechanics of question-and-answer interrogation become impossible. The rule excluding witnesses from the courtroom may be invoked, yet the advocate-witness obviously must be allowed to remain. The advocate who testifies places himself in the position of being able to argue his own credibility. . . . Any mixing of those roles inevitably diminishes the effectiveness of the entire system. . . . [and] also disrupts the normal balance of judicial machinery.

323. Christensen v. United States, 90 F.2d 152, 154 (7th Cir. 1937).

324. United States v. Siegner, 498 F. Supp. 282, 285 (E.D. Pa. 1980).

325. Canon Airways v. Franklin Holdings Corp. 669 F. Supp. 96, 99 (D. Del. 1987).

326. Enker, supra note 266, at 463, quoting Sir Hartley Shawcross, The Functions and Responsibilities of an Advocate, in 2 Association of the Bar of the City of New York, Benjamin N. Cardozo Memorial Lectures 1941-1970, at 631, 638 (1972).

327. Brown & Brown, supra note 284, at 613.

328. Id.

329. Note, If Z, Then X, supra note 281, at 1396. An example of such bifurcated responsibilities in practice, though not apparently due to advocate-witness considerations, is the United States Army's handling of disputes arising with civilian businesses with which it contracts. Generally, an attorney located at the contract site provides legal advice concerning formation and administration of the contract. When contract disputes arise requiring resolution through litigation, a Contract Appeals Division attorney, operating from offices in Washington D.C., assumes trial responsibility for that case.

330. Garcia, Hard Cases, Strong Cure, Time, Feb. 13, 1989, at 53.

331. MacArthur v. Bank of New York, 524 F. Supp. 1205, 1210 (S.D.N.Y. 1981). Tactical advantage aspects of the advocate-witness rule is are discussed at infra notes 396-429 and accompanying text.

332. Comment, Ethical Paradox, supra note 273, at 271.

333. Enker, supra note 266, at 463.

334. Jones v. City of Chicago, 610 F.Supp. 350, 362 (N.D. Ill. 1984). See Cramer, supra note 126, at 824 ("Because partisan interest motivates the advocate, he may not be a completely objective witness.").

335. Levin & Levy, supra note 260, at 155.

336. Law. Man. on Prof. Conduct (ABA/BNA) 61:506.

337. United States v. Cunningham, 672 F.2d 1064, 1069 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984).

338. Id. at 1074-75. See United States v. Peng, 602 F. Supp. 298, 310 (S.D.N.Y. 1985), aff'd, U.S. Kwang Fu Peng 766 F.2d 82 (2d Cir. 1985) (Three members of a law firm were among those who attended a meeting relevant to a trial at which one of the members was the trial counsel.

> "It is clear that even if [the trial attorney] does not testify . . . there remains the danger that when he cross-examined his partners or gave a closing argument he would be able to put his version of events before the jury, he would be implicitly testifying as to his version of the conversation. . . . Since, as an unsworn

witness he would not be subject to cross-examination or explicit impeachment, the interest to be protected by the DR's would be even more seriously eroded than if he appeared as a witness."

339. Peng, 602 F. Supp. at 310.

340. Id. at 301.

341. Sutton, supra note 266, at 481.

342. Wydick, supra note 126, at 664.

343. Sutton, supra note 266, at 481.

344. Wydick, supra note 126, at 663-64.

345. This rationale appears from the party opposing the advocate-witness in Duncan v. Poythress, 750 F.2d 1540, 1545 (11th Cir. 1985), vacated, 756 F.2d 1481 (1985). The Court of Appeals for the Eleventh Circuit rendered essentially the same decision as the vacated opinion, en banc, in Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475, U.S. 1129 (1986). Interestingly, the dissent in this en banc decision cites in excess of twenty dictionary definitions of "attorney," and each imposes a requirement of acting "for another." Id. at 1518, Rodney, J., dissenting).

346. Id.

347. Jones v. City of Chicago, 610 F. Supp. 350, 362 (N.D. Ill. 1984), rev'd on other grounds, 856 F.2d 985 (7th Cir. 1988).

348. Enker, supra note 266, at 464.

349. See supra note 260 and accompanying text.

350. See supra notes 286-288 and accompanying text.

351. Law. Man. on Prof. Conduct (ABA/BNA) 61:505-06.

352. United States v. Gordon, 27 M.J. 331, 332 (C.M.A. 1989).

353. Id.

354. International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975).

355. A trial advocacy truism says: If the case is weak on the facts, pound on the law. If it is weak on the law, pound on the facts. If it is weak on the law and the facts, pound on the table. The multitude of rationales for the advocate-witness rule may be an example of its proponents "pounding on the table."

356. Courts have really been active in this area only since the advent of the Model Code of Professional Responsibility. But see Note, If Z, Then X, supra note 281, at 1400 ("The advocate-witness rule has enjoyed a long but less than venerable career").

357. Sutton, supra note 266, at 477 (There is reason to believe that the reasons for the rule's existence have been forgotten). See Enker, supra note 266, at 456 ("[D]espite this unanimously vigorous condemnation of the practice of appearing in dual roles, the literature has shown remarkable uncertainty over the reasons for the rule").

358. See Sutton, supra note 266, at 488

> An important reason for the existence of a code of ethics is its educational value to the bar. To be educational, the code must be reasonably complete and explanatory so that lawyers and courts may rely safely upon it. Canon 19, by requiring advocates to take action which in some circumstances is not truly consistent with a lawyer's responsibility, victimizes courts, attorneys and clients.

The Model Code of Professional Responsibility caused even more confusion than Canon 19. The Model Rules of Professional Conduct are too new to have established whether they will meet Professor Sutton's call for clarity.

359. McCown, Ethical Problems in Probate Matters, 39 Neb. L. Rev. 343, 348 (1960) ("The great majority of violations do not occur deliberately, but are rather the unintentional consequence of an unrecognized problem.").

360. Brown & Brown, supra note 284, at 621 ("Courts and legislatures have accepted and implemented [the rule] without scrutinizing either the rationales that supposedly underlie it, or any empirical data showing

that the rule is important to the standing or reputation of the profession").

361. See Id. at 623 (The advocate-witness rule is an illustration of an ethics system that ignores the client and "speaks, out of habit, of legal practice as courtroom practice").

362. United States v. Gouveia, 467 U.S. 180, 187 (1984).

363. Tornay v. United States, 840 F.2d 1424, 1429 (9th Cir. 1988). See Gunther v. United States, 230 F.2d 222, 223 (D.C. Cir. 1956) (Post-indictment, the state wanted to call a lawyer the accused had released to testify as to the accused's sanity. This court was concerned not only with privilege problems, but also said that to allow the state to proceed in such a fashion "would also invade an accused's right to counsel in the trial of the criminal charge.").

364. If the attorney fit within an exception, he may avoid the advocate-witness rule. Many issues to which the attorney may testify before a grand jury would not violate the conflict of interest rules, for example, dates of employment and amount of the fee for services performed. Yet, testifying to these same issues at trial might violate the advocate-witness rule, particularly in those courts that apply the rule rigidly. See, e.g., Id. at 1430; In Re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 245 (2d Cir. 1985), cert. denied, 475 U.S. 1108 (1986).

365. In Re Grand Jury Subpoena Served Upon Doe, 781 F.2d at 245, cert. denied, 475 U.S. 1108 (1986).

366. Brown & Brown, supra note 284, at 617.

367. Id. at 618.

368. United States v. Baca, 27 M.J. 110, 117 (C.M.A. 1988).

369. See Optyl Eyewear Fashion Int'l. v. Style Companies, 760 F.2d 1045, 1051 (9th Cir. 1985).

370. Sutton, supra note 266, at 487. See Baca, 27 M.J. at 119 (Such a severance of the attorney-client relationship should only be for good cause, and the dual role of witness and advocate is not good cause per se).

371. See supra note 366 and accompanying text.

372. United States ex rel. Sheldon Electric Co., Inc. v. Blackhawk Heating, 423 F. Supp. 486, 490 n.5 (S.D.N.Y. 1976).

373. Lyons v. United States, 325 F.2d 370, 376 (9th Cir. 1963), cert. denied, 377 U.S. 969 (1964).

374. Brown & Brown, supra note 284, at 603.

375. See, e.g., United States v. Siegner, 498 F. Supp. 282, 287 (E.D. Pa. 1980).

376. United States v. Baca, 27 M.J. 110, 119 (C.M.A. 1988).

377. Suni, Subpoena for Criminal Defense Lawyers: A Proposal for Limits, 65 Or. L. Rev. 215, 225, n.30 (The United States Supreme Court has never expressly endorsed the concept of a right to counsel of choice. Instead, the majority of that court views the right to an attorney as protecting the right to a fair trial.)

378. Cramer, supra note 126, at 828.

379. In Re American Cable Productions, Inc. 768 F.2d 1194, 1196 (10th Cir. 1985). Though this case involved an attorney-defendant who wanted his partner to represent him at trial, this language seems applicable to any party.

380. United States v. Siegner, 498 F. Supp. 282, 287 (E.D. Pa. 1980).

381. United States v. Freeman, 519 F.2d 67, 68 (9th Cir. 1975).

382. In Re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 245 (2d Cir. 1985), cert. denied, 475 U.S. 1108 (1986). Such a ruling based on the equity power of the court is analogous to granting the opposing counsel's Rule of Evidence 403 motion in advance of trial, and yields the same result. The advocate may not testify until he withdraws.

383. United States v. Cook, 27 M.J. 212, 214 n.3 (C.M.A. 1988).

384. United States v Baca, 27 M.J. 110, 119 (C.M.A. 1988).

385. United States v. Cook, 27 M.J. 212, 216 (C.M.A. 1988).

386. Hearings on S. 3274, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 84-85 (1976) (statement of Melvin B. Lewis), quoted in Suni, supra note 377, at 223.

387. Worse would be government access to an attorney released by a client. In Gunther v. United States, 230 F.2d 222, 223 (D.C. Cir. 1956) The government tried to use the defendant's former defense attorney to proves his sanity, but the court did not accept this evidence on grounds of privilege and right to counsel.

388. Brown & Brown, supra note 284, at 598.

389. Note, If Z, Then X, supra note 281, at 1384.

390. Brown & Brown, supra note 284, at 617.

391. Note, If Z, Then X, supra note 281, at 1386.

392. Id.

393. Brown & Brown, supra note 284, at 622.

394. Suni, supra note 377, at 236.

395. Id. at 228.

396. Fair or Futile?, supra note 304 at 807 ("The rule provides a delay tactic for the opposition. If counsel wishes to delay the trial, he may move to disqualify his opponent on less than legitimate grounds."). See Note, If Z, Then X, supra note 281, at 1385 ("If counsel wishes to delay adjudication on the merits, therefore, he may be tempted to move to disqualify his opponent on spurious grounds."); Law. Man. on Prof. Conduct (ABA/BNA) 61:507 ("[T]he provisions of DR 5-102 of the ABA Model Code frequently been employed as tactical measures to disrupt an opposing party's preparation for litigation.").

397. See supra note 235 and accompanying text.

398. Wydick, supra note 126, at 673 ("Through a motion to disqualify opposing counsel, such a litigant can put off an impending trial and often saddle the opponent with enormous added expense.").

399. Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1354 (D. Colo. 1976).

400. See, e.g., Jones v. City of Chicago, 610 F. Supp. 350, 359-60 (N.D. Ill. 1984), rev'd on other grounds

856 F.2d 985 (7th Cir. 1988); Canon Airways v. Franklin Holding Corp., 669 F. Supp. 96, 100 (D. Del. 1987) (The rule is "susceptible to use as a tactical measure to disrupt an opposing party's preparation for trial."); Kalmanovitz v. G. Heilman Brewing Co., 610 F. Supp. 1319, 1321 (D. Del. 1985) ("The attempt by an opposing party to disqualify the other side's counsel must be viewed as a part of the tactics of an adversary proceeding."), aff'd, Kalmanovitz v. G. Heilman Brewing Co. 769 F.2d 152 (3rd Cir. 1985).

401. Brown & Brown, supra note 284, at 619.

402. Note, If Z, Then X, supra note 281, at 1385.

403. Brown & Brown, supra note 284, at 621. The longer a court waits to rule on such a motion, for example until after discovery, but then applies the rule rigidly, the greater the costs inflicted. Id. at 605.

404. See supra note 46 and accompanying text.

405. See supra note 159 and accompanying text.

406. MacArthur v. Bank of New York, 524 F. Supp. 1205, 1211 (S.D.N.Y. 1981).

407. See supra notes 125-144 and accompanying text.

408. Wydick, supra note 126, at 673. Professor Wydick notes, Id. at n.110, that the "opportunities for delay

and harassment were aggravated in those federal circuits that formerly allowed an interlocutory appeal from the denial of a motion to disqualify the opponent's counsel. See Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980), overruling Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp. 496 F.2d 800 (2d Cir. 1974) (en banc). But the Supreme Court put an end to such interlocutory appeals in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)."

409. Note, The Advocate-Witness Rule: If Z, Then X, But Why? 52 N.Y.U. L. Rev. 1365, 1374 (1977) [hereinafter Note, If Z, Then X]. The author cites cases illustrating each of these uses.

410. Brown & Brown, Disqualification of the Testifying Advocate - A Firm Rule?, 57 N.C.L. Rev. 597, 619 (1979).

411. The hidden expense of hiring a second counsel to replace original counsel is discussed supra notes 225-239 and accompanying text.

412. Brown & Brown, supra note 410, at 620.

413. Id. The authors point out that discovery "would be a perfect vehicle for harassing the opposing firm by taking depositions of all attorneys involved, in the hope of discovering at least one potential witness." Opening discovery into such an area could result in disputes over privilege and work product that could dramatically slow the proceedings. The Model Rules

largely negate this tactic by refusing to disqualify an entire firm when one member of that firm will be a witness.

414. Id.

415. Kaiser Steel Corp. v. Frank Coluccio Const. Co., 785 F.2d 656, 658-59 (9th Cir. 1986).

416. United States v. Siegner, 498 F. Supp. 282, 287 (E.D. Pa. 1980). Though this court only expressly mentions conflict of interest in this context, the court also expressed concern with confidentiality and the advocate-witness rule in this case. The same rationale by the court should apply to either of these ethical issues as well.

417. Suni, supra note 377, at 236. See Id. at 221 n.21. The author quotes the New York Times, in an editorial entitled "Lawyers and the Mob," as stating, "The power to subpoena lawyers, creating a conflict that may force them to withdraw from a case, is at least potentially a prosecution power to disarm the defense." [The author provides no further information on this article's location].

418. See supra notes 386-395 and accompanying text for a discussion of the effect of the advocate-witness rule on the attorney-client relationship.

419. 54 U.S.L.W. 2414, 2415 (Feb 18, 1986) 377. See Note, If Z, Then X, supra note 409, at 1382-83 n.108.

(The author shows that, as of the time of that article, 1977, the Justice Department had a policy of "demanding disqualification if the need for counsel's testimony could have been anticipated from the start of the litigation." The Internal Revenue Service, at that same time, followed a policy of informing the court and opposing counsel in this situation, but refused to make the motion to disqualify. The IRS apparently felt that "the trial stage [was] an inappropriate time to allege a violation of the Disciplinary Rules. . . .") This conflict among federal agencies in addressing the attorney-witness situation illustrates the point that the issue is not clearly one for the courts, and that the rule represents no universal principal that clearly demands judicial enforcement.

420. Law. Man. on Prof. Conduct (ABA/BNA) 61:508 ("Some courts have refused to apply the rule to disqualify the staff of a prosecutor's office. . . .").

421. Id. at 511. See Baker v. Leahy, 633 F. Supp. 763, 765 (E.D. Pa. 1985)

> "[W]itness who is a government attorney does not have a financial interest in the outcome of litigation conducted by an affiliated attorney as does a witness who is an attorney in a private firm. This lack of financial interest justifies a narrow construction of the rule in cases where no prejudice is shown."

In a perfect world, prosecutors would not care about advancing their careers, adulation of the public, reelection, and victory. As long as prosecutors are human beings, isolating money as the reason a lawyer

might abuse the dual role of advocate and witness, and then applying a stricter advocate-witness rule to fee earning attorneys, is naive.

422. In Flanagan v. United States, 465 U.S. 259, 260 (1984) the Supreme Court held that denial of defense counsel, because of apparent conflict, was not immediately appealable as a collateral order. While this is consistent with the civil action rule, see supra notes 417-422, it serves to increase the prosecutor's disqualification power in criminal cases.

423. Comden v. Superior Court of Los Angeles County, 20 Cal. 3d 906, 912, 576 P.2d 971, 973 (1978), cert. denied, 439 U.S. 981 (1978).

424. Optyl Eyewear Fashion Int'l. v. Style Companies 760 F.2d 1045, 1051 (9th Cir. 1985) (The opposing attorneys had obtained by mailing a questionnaire to many of their client's customers).

425. Id. at 1050.

426. Id. quoting Rice v. Baren, 456 F. Supp. 1361, 1370 (S.D.N.Y. 1978) See Dalrymple v. Nat'l. Bank & Trust Co. of Traverse City, 615 F. Supp. 979, 983-84 (D.C. Mich. 1985) (The court found that the substance of the attorney's testimony "would not be crucial or necessary."); Kalmanovitz v. G. Heilman Brewing Co., 610 F. Supp. 1319, 1323 (D. Del. 1985) (Disqualification motions demand "strict judicial scrutiny to prevent literalism from overcoming

substantial justice to the parties." quoting J.P. Foley & Co. v. Vanderbilt 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J. concurring)), aff'd, 769 F.2d 152 (3rd Cir. 1985); Sutton, supra note 266, at 485 ("[I]t would be a dangerous doctrine which would permit one party to eject the opposition's advocate from the case simply by calling upon him to testify.").

427. See supra notes 386-395 and accompanying text, reference effect on attorney-client relationship. Nor is client consent the only proposed solution. See Comment, Attorney as Both, supra note 266, at 134 ("This withdrawal requirement, however, would be a wicked sword in the hands of an attorney who wished to force opposing counsel from the trial." The author goes on to propose that suppressing such testimony resolves the issue. Actually, the issue remains live, because the client and the attorney are still faced with the decision of the evidence or the representation. At least they have some choice, but a better solution, assuming the advocate-witness rule must exist at all, is client consent to his counsel performing in both roles in his case.

428. See Brown & Brown, supra note 410, at 623 (Consent "should eliminate the use of the rule as a tactical weapon; it should also reduce the enormous costs of the rule, both direct and indirect, not only in the planning stages of a transaction, but in all stages of the litigation."); Wydick, Trial Counsel as Witness: The Code and the Model Rules, 15 U.C. Davis L. Rev. 651, 666 (1982) (The lawyer and his client are in

the best position to decide how to proceed. This approach "minimizes the chances that the adversary will be able to use a disqualification motion to deprive the client of chosen trial counsel.") Cf. Cramer, supra note ?, at 829 ("[T]o the extent that courts allow the attorney and the client to decide whether the attorney should testify and withdraw or continue the representation. . . .").

429. Cramer, supra note 126, at 827.

430. Maine v. Rittenmeyer, 169 Iowa 675, 678, 151 N.W. 499, 500 (1915).

431. One reason for such close scrutiny might be because of possibly severe damage to the client's case which might occur if the opposing counsel could somehow present a rift between attorney and client to the jury. See supra notes 244-249 and accompanying text.

432. Dalrymple v. Nat'l Bank v. Trust Co. of Traverse City, 615 F. Supp. 979, 983-84 (D.C. Mich. 1985).

433. United States v. Crockett, 506 F.2d 759, 760 (5th Cir. 1975), cert. denied, 423 U.S. 824 (1975).

434. United States v. Torres, 503 F.2d 1120, 1126 (2d Cir. 1974). See United States v. West, 680 F.2d 652, 654 (9th Cir. 1982); United States v. Trapnell, 638 F.2d 1016, 1025 (7th Cir. 1980).

435. See, e.g., Crockett, 506 F.2d at 760; United States v. Fiorillo, 376 F.2d 180, 185 (2d Cir. 1967).

436. See supra note 118. (Such redundancy is doubly so when courts are willing to apply their inherent power to obtain similar results. See supra notes 115-118 and accompanying text).

437. The secretary is present in part to prevent later advocate-witness rule problems. See ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecutorial Function and the Defense Function, The Prosecution Function, § 4.3(d) (Approved Draft 1971), which states:

> The prosecutor should avoid interviewing a prospective witness except in the presence of a third person unless the prosecutor is prepared to forego impeachment of a witness by the prosecutor's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present his impeaching testimony.

438. The defense counsel should carefully consider this decision, because he will then be exposing his client to a well-constructed closing argument by the prosecutor, or his replacement if the judge forces his withdrawal, such as: "She was truthful in my office; she couldn't remember, and that embarrassed her so she made excuses. Now, after extensive and painful therapy, she can force herself to tell you exactly what happened. And though she knew she would be called a liar by the accused, she was willing to suffer that

cruel indignity to see this terrible fate befalls no other innocent young women in this community. . . ."

439. Whether the defense counsel moved to disqualify or not may not lead to different results. See Comment, Attorney as Both, supra note 266, at 133-34. (As of 1970, no case reported a counsel being disqualified when called by the opposing party to testify. "Since Rule 19 of the Canon of Ethics requires an attorney to withdraw from a case when he testifies for his client and not when he testifies against his client, these cases do not appear to violate the rule."); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975), at 4 ("No disciplinary rule requires the withdrawal of a lawyer who, at trial, is called as a witness by an opposing party if the lawyer had no previous knowledge or reasonable basis for believing that he ought to be called by that party." The opinion vacillates a few sentences later. "[W]e are not prepared to hold [testifying adverse to the client's interests] would never be ethically permissible, but we note that with such employment the lawyer also accepts a heavy responsibility.").

440. See supra notes 431-435 and accompanying text.

441. Fair or Futile?, supra note 304, at 807.

442. Gunther v. United States, 230 F.2d 222, 223-24 (D.C. Cir. 1956).

443. MacArthur v. Bank of New York, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981).

444. This hypothetical intentionally examined the most difficult case, because the criminal defendant has compulsory process rights making denial of any witness he requests a sensitive issue. An aggressive defendant's counsel could avail himself of the court's equity powers to force the prosecutor's withdrawal before testifying, even if the prosecutor was willing to take the stand. Prosecutors make dangerously credible witnesses in the same case in which the are trial counsel, and cross-examination could devastate the defense case. See supra notes 268-269 and accompanying text. Justice may require the judge to duplicate precisely the advocate-witness rule result: withdraw and testify. In civil trial situations, the judge's broad equity powers should more easily reach this same result.

445. Sutton, The Testifying Advocate, 41 Tex. L. Rev. 477, 498 (1963).

446. See, e.g., United States v. Baca, 27 M.J. 110, 117-18 (C.M.A. 1988) (Other sources of testimony and impeachability of advocate-witness (protect the client), opposing counsel allowed full cross-examination (protect opposing party), and protect the testifying advocate from arguing his own credibility, motion out of the jury's presence (protect the system and the profession). Baca is the one case that considered many factors in making its decision.);

Cramer, supra note 126, at 828 (no significant detriment to the opponent and no taint of the legal system); Fair or Futile?, supra note 304, at 802 n.48 (prejudice to the opposing party, availability of the evidence through other sources (protect the client), and obtaining justice);

447. Wydick, supra note 428, at 693.

448. Id. The idea of differentiating between judge and jury situations also appears in court opinions, See, e.g., Duncan v. Poythress, 750 F.2d 1540, 1546 (11th Cir. 1985) vacated, 756 F.2d 1481 (1985). The Court of Appeals for the Eleventh Circuit rendered essentially the same decision as the vacated opinion, en banc, in Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475, U.S. 1129 (1986).; and is the second of a list of factors that courts do often not consider compiled in Fair or Futile?, supra note 304, at 1366.

449. Note, If Z, Then X, supra note 409, at 1366.

450. In United States v. Baca, 27 M.J. 110, 118 (C.M.A. 1988) The defense proceeded on a pretrial issue by letting the assistant defense counsel litigate the motion, while the lead counsel testified in support of that motion. The court approved of this technique as fair to the prosecution and as protecting the lead defense counsel from the "unseemly and ineffective" position of arguing his own credibility. See Law. Man. on Prof. Conduct (ABA/BNA) 61:507 (Rule 3.7(a) would

not prevent a witness-lawyer from associating with another lawyer who would act as trial counsel.); Note, If Z, Then X, supra note 409, at 1389 (An assistant counsel would avoid "a vaudevillian routine to question himself upon the stand." The author cites Woody Allen's Bananas in support of dilemma of a lawyer performing his own direct examination.) But see Sutton, supra note 445, at 468 n.39 (But the "mere presence of co-counsel does not solve this problem," because that lawyer may be unable to fill the actual trial counsel duties.)

451. Wydick, supra note 428, at 693-94.

452. Duncan v. Poythress, 750 F.2d 1540, 1546 (11th Cir. 1985), vacated, 756 F.2d 1481 (1985). The Court of Appeals for the Eleventh Circuit rendered essentially the same decision as the vacated opinion, en banc, in Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475, U.S. 1129 (1986).

453. United States v. Baca, 27 M.J. 110, 118 (C.M.A. 1988).

454. Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1354 (D. Colo. 1976).

455. Note, If Z, Then X, supra note 409, at 1390.

456. Id. at 1395.

457. United States v. Cook, 27 M.J. 212, 214 n.3 (C.M.A. 1988).

458. Note, Legal Ethics, supra note 31, at 299.

459. Comment, Attorney as Both, supra note 266, at 144.

460. Sutton, supra note 445, at 495-96. See Brown & Brown, supra note 410, at 622.

461. See Comment, Attorney as Both, supra note 266, at 139

462. Sutton, supra note 445, at 483-84. See Note, If Z, Then X, supra note 409, at 1373 n.40 ("An attorney need not be disqualified automatically because he has first-hand knowledge about the subject matter of a lawsuit.").

463. See Sutton, supra note 445, at 497 ("But in general, diligent use of the regular disciplinary machinery is the most satisfactory way to curtail improper conduct by the testifying advocate.").

464. Sutton, supra note 445, at 497.

465. Brown & Brown, supra note 410, at 622.

466. See supra note 445 and accompanying text.

467. See supra note 18 and accompanying text.

468. See supra notes 199-355 and accompanying text reference reasons for the rule.

469. Model Rules of Professional Conduct, Rule 3.7 comment.

470. See supra notes 250-269 and 203-249 and accompanying text.

471. See supra notes 54-156 and accompanying text.

472. See supra notes 396-429 and accompanying text.

473. See supra note 412 and accompanying text.

474. See supra notes 362-385 and accompanying text.

475. See supra notes 386-395 and accompanying text.

476. See supra notes 237-239 and accompanying text.

477. See supra note 403 and accompanying text.

478. See supra notes 315-317 and accompanying text.

479. See supra note 306 and accompanying text.

480. See supra notes 286-289 and accompanying text.

481. See supra notes 255-267 and accompanying text.

482. Fed. R. Evid. 403.

483. See supra notes 194, 232-234 and accompanying text.

484. Id.

485. See supra notes 203-249 and accompanying text.

486. See supra notes 194, 232-249 and accompanying text.

487. See supra note 249 and accompanying text.

488. See supra notes 291-321 and accompanying text.

489. See supra notes 460-465 and accompanying text.